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Green Boardrooms?

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Green Boardrooms?

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Corporate and securities law tools are increasingly being used to address climate change. Disclosure of climate-related business risks and shareholder proposals and engagement have grown in the United States and globally, as have broader efforts to use these tools to address environmental and social issues. Emerging fiduciary duty suits in other jurisdictions claim that corporate boards have failed to monitor and manage climate-related risks adequately. However, legal scholarship has failed to assess whether these efforts are actually changing corporate behavior. This Article draws on original interviews with corporate leaders and investors in the United States and Australia to assess the effectiveness of corporate and securities law tools in addressing climate change. It finds that while disclosures and shareholder proposals related to climate change have been extensive, they have not yet changed corporate behavior much, if at all. The Article therefore proposes a multi-pronged approach to increase the future effectiveness of disclosure, shareholder proposals and engagement, and fiduciary duty. This study offers new insights into the old debate over how corporations can and should be used to address societal problems.

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INTRODUCTION

In 2017, the shareholders of three major fossil fuel companies, including ExxonMobil, approved proposals requiring that the companies produce detailed reports concerning climate change and their businesses.¹ Shareholders called for these analyses to incorporate the potential impact on the companies of the Paris Climate Agreement's goal of limiting global warming to well below two degrees Celsius.² In 2018, the Sustainability Accounting Standards Board published a set of standards to guide voluntary reporting on a wide range of topics, including climate change, with guidance particularized to the needs of seventy-seven different industries.³

These are two examples among many of initiatives being undertaken in the United States and around the world to use securities and corporate law tools—disclosure, shareholder proposals and engagement, and fiduciary

^{*} Professor and Dorsey & Whitney Chair, University of Minnesota Law School; Director, Institute for Law and Economics, University of Minnesota Law School. This research received funding support from the Australian Research Council Discovery Project grant on “Devising a Legal Blueprint for Corporate Energy Transition” (2016–20). We are grateful to Rebekkah Markey-Towler and Maggie Kolcon for assistance with referencing for this Article and to numerous colleagues, in the United States and Australia, who provided helpful comments and feedback on earlier drafts. We would particularly like to thank David Barnden, Madison Condon, Katrina Fischer Kuh, Michael Gerrard, Joan Heminway, Claire Hill, Rosemary Langford, Ann Lipton, John Matheson, Elizabeth Pollman, Ian Ramsay, Usha Rodrigues, Paul Rubin, Hillary Sale, Omari Simmons, Michael Vanderbergh, Gina Warren, and the participants in the 2020 AALS Environmental Law and Natural Resources and Energy Law Sections *Food, Environmental and Natural Resources Works in Progress* Session and a Faculty Works in Progress session at the University of Minnesota Law School.

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¹ Cydney Posner, *Are Shareholder Proposals on Climate Change Becoming a Thing?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 21, 2017), <https://corpgov.law.harvard.edu/2017/06/21/are-shareholder-proposals-on-climate-change-becoming-a-thing/> (discussing these three resolutions).

² Article 2(1)(a) of the 2015 Paris Agreement calls on parties to hold global average temperature rises “to well below 2°C above pre-industrial levels” and to pursue efforts to contain temperature rises to no more than 1.5 degrees Celsius. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

³ *Download SASB Standards*, SASB, <https://www.sasb.org/standards-overview/download-current-standards/> (last visited Mar. 18, 2021). The Board is one of many organizations that has emerged to create voluntary sustainability disclosure standards. *Infra* notes 110–14 and accompanying text.

duty litigation—to pressure corporations to respond more quickly to the challenges of climate change in their business plans and investments.⁴ Companies increasingly provide sustainability disclosures in their annual reporting and on their websites, though the quality of the information varies.⁵ The number of shareholder proposals on climate change, and votes in support of them, continue to grow.⁶ And lawsuits asserting fraud in disclosure or a failure to monitor and manage climate change-related risks⁷ adequately have begun to emerge globally.⁸

These tools are not only being used to address climate change. That topic is just one of a number of environmental and social issues⁹ that new disclosure frameworks and shareholder proposals are targeting. Other common issues include gender pay equity, workplace diversity, and political and lobbying expenditures by corporations.¹⁰ The initiatives addressing these issues form a new phase in a cycle of corporate governance debates raising fundamental questions of corporate law:¹¹ In whose interests should

⁴ Disclosure involves companies providing information about climate change risks and activities. Shareholder proposals involve someone who has a share in the company bringing a proposal to be voted on by shareholders demanding that the company be responsive to climate change. Fiduciary duty suits claim that companies have a fiduciary duty to address the risks of climate change. For an analysis of these tools, see generally Hari M. Osofsky, Jacqueline Peel, Brett McDonnell & Anita Foerster, *Energy Re-Investment*, 94 IND. L.J. 595 (2019) [hereinafter Osofsky et al., *Energy Re-Investment*].

⁵ JIM COBURN & JACKIE COOK, CERES, COOL RESPONSE: THE SEC & CORPORATE CLIMATE CHANGE REPORTING 11–12 (2014); SOL KWON, IRRC INST., STATE OF SUSTAINABILITY AND INTEGRATED REPORTING 2018, at 33 (2018) [hereinafter KWON, STATE OF SUSTAINABILITY]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 18 (2020) [hereinafter PUBLIC COMPANIES REPORT].

⁶ Press Release, Conf. Bd., In 2020, Companies Will Continue to Face Pressure to Diversify Their Boards, Address Pay Gaps, and Expand Political Contribution Disclosure (Dec. 17, 2019), <https://conference-board.org/press/environmental-social-policies-of-corporations>.

⁷ We use the term “climate change-related risks” or “climate risk” in this Article to refer to the two principal categories of risk that climate change may pose for businesses that have been identified by the Taskforce on Climate-Related Financial Disclosures (TCFD): *physical* risks, i.e., risks posed by climate change to the assets, operations, and supply chains of a company, and *transition* risks, i.e., risks associated with the transition to a low-carbon economy, which can include risks due to new regulatory requirements, potential litigation, technology change, or reputational or brand damage. TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 5–6 (2017) [hereinafter TCFD, FINAL REPORT]. Our focus in this Article is primarily on transition risk, as we are concerned with how companies are responding to the challenge of transitioning business practices for a low-carbon economy.

⁸ *Infra* note 299 and accompanying text.

⁹ Along with governance issues, these sorts of issues are frequently referred to as ESG matters. PUBLIC COMPANIES REPORT, *supra* note 5, at 1. We will also frequently use the term “sustainability” to cover the range of environmental and social topics currently being addressed in corporate governance circles.

¹⁰ Marc Treviño, *2019 Proxy Season Review: Part 1—Rule 14a-8 Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2019), <https://corpgov.law.harvard.edu/2019/07/26/2019-proxy-season-review-part-1-rule-14a-8-shareholder-proposals/>.

¹¹ C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 77–78 (2002); Brett McDonnell, *The Corrosion Critique of Benefit Corporations* 6–9 (U. Minn. L. Sch. Working Paper, Paper No. 19-24, 2019), <https://ssrn.com/abstract=3450747>.

corporations be governed? How can we ensure that corporations best advance the public good?¹² However, amid all this activity and debate, the critical question remains of whether this new activism is actually changing corporate behavior.

This Article analyzes whether corporate and securities law can impact corporate behavior with respect to climate change, drawing on original interviews with corporate managers, investors, regulators, and other relevant stakeholders in the United States and Australia.¹³ Through the interviews, we sought a deeper understanding of how different actors perceive climate-related uses of securities law tools and how companies are responding. This included an effort to understand how, if at all, voluntary disclosure and shareholder proposals and engagement have succeeded so far at getting companies to address climate change-related risks.¹⁴

Our findings indicate these corporate and financial law initiatives have not yet had a significant impact on underlying corporate behavior in ways that substantively affect the allocation of resources and capital to address climate change.¹⁵ However, those interviewed generally accept that even under corporate law models focused on enhancing long-term shareholder value (rather than considering other key stakeholders and the general public), companies will need to pay greater attention to policy issues such as climate change that are likely to have serious effects on financial performance.¹⁶ Importantly, compared to the situation just five years ago, many more companies and investors in both countries now understand climate change to pose financial risks for businesses.¹⁷

Based on these findings, this Article proposes pathways for enhancing the effectiveness of corporate and financial law tools.¹⁸ Australia provides a particularly helpful comparative example for the United States in developing these strategies because of its legal, socio-political, and economic similarities. Drawing from the interviews and evolving use of the tools in practice, this Article considers how they could be used more effectively. In doing so, it recognizes the ongoing debate in corporate law about whether corporations should focus only on enhancing value for their shareholders or also consider other stakeholders and the general public.¹⁹ This Article argues that even if a model focused on enhancing long-term shareholder value is

¹² *Infra* Section I.A.

¹³ A total of thirty-eight interviews were undertaken, fourteen with stakeholders in the United States and twenty-four with stakeholders in Australia. Additional details of different groups of participants in the interviews are below. *Infra* notes 99–100 and accompanying text. A separate online appendix provides further information on the interview methodology and analysis.

¹⁴ *Infra* notes 99–100

¹⁵ *Infra* Parts II–IV.

¹⁶ *Infra* Parts II–IV.

¹⁷ *Infra* Parts II–IV.

¹⁸ *Infra* Part V.

¹⁹ *Infra* Section I.A.

not ideally suited to addressing problems like climate change, working within its structure—while exploring longer-term reform—is most likely to be effective in our current political environment.²⁰ For each tool, we outline what truly deep reform to create stakeholder-focused corporations might look like, but also suggest more modest reforms within the prevailing long-term shareholder value paradigm that have better prospects of success, while nudging corporations in a more stakeholder-focused direction.

In the case of disclosure, a stakeholder focus would suggest comprehensive new mandatory disclosure rules,²¹ along the lines of what has emerged in the European Union (EU),²² while more modest reform would entail the Securities and Exchange Commission (SEC) mandating more specific disclosure of items related to climate change that have a material impact on financial results and adopting one of the new private standards for disclosure to provide greater uniformity.²³

Regarding shareholder actions and engagement, a stakeholder focus would empower persons with environmental expertise at the board level or through advisory councils, while modest reform would bring SEC treatment of proposals concerning greenhouse gas emissions and Department of Labor guidance on the duty of retirement plan fiduciaries back to its approach under the Obama Administration. We also recommend a variety of types of

²⁰ *Infra* Part V.

²¹ See Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 503 (2020) (recommending a legally mandated disclosure system for large companies, which would disclose financial information as well as information regarding corporate governance, environmental impact, labor relationships, and consumer protection); see also Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 928 (2019) (discussing the 2014 EU Directive on the Disclosure of Non-Financial and Diversity Information that requires specific sustainability disclosures); Cynthia A. Williams & Jill E. Fisch, *Petition to SEC for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 9, 2018), <https://corpgov.law.harvard.edu/2018/10/09/petition-to-sec-for-rulemaking-on-environmental-social-and-governance-esg-disclosure/> (petitioning the SEC to engage in notice and comment rule-making regarding disclosure rules for environmental, social and governance concerns).

²² The EU's Non-Financial Reporting Directive requires large undertakings across the EU to include a non-financial statement in the management report containing information on environmental, social and employee, human rights, and bribery and anti-corruption related issues. Council Directive 2014/95, art. 6, 2014 O.J. (L 330) 1, 2–3 (EU). In June 2017, the European Commission published non-binding guidelines on non-financial reporting to help companies provide high quality disclosure of environmental, social, and governance-related information. Council Directive 2017/4234, arts. 1–2, 2017 O.J. (C 215) 1, 2–3 (EC). Further, in June 2019, the European Commission published non-binding guidelines specifically on reporting climate-related information. The guidelines were developed as part of the European Commission's 2018 Action Plan on Financing Sustainable Growth, which aims to foster sustainable investment, manage financial risks associated with climate change and other environmental and social problems, and encourage transparent and long-term focused financial activity. The guidelines supplement the existing 2014 Directive and non-binding guidelines, and they integrate the recommendations of the TCFD. Council Directive 2019/4490, art. 1, 2019 O.J. (C 209) 1, 2–3 (EC).

²³ See *supra* note 3 and accompanying text. The SEC could require issuers to either comply with those standards or explain why they are not material for their business. Climate change disclosure should include analysis of how world governments responding to a two degree Celsius or lower scenario as required by the Paris Agreement would affect the disclosing company. See *infra* Part V.

shareholder proposals that climate change activists may want to pursue, some of which are already being tried in the United States and Australia but could be expanded, and others of which are new suggestions based on our interview findings.²⁴

With respect to fiduciary duty, we note the immense obstacles that a breach of duty climate change suit faces under governing law, but also draw attention to the emergence of such suits in other countries and comment on their potential application in a U.S. context. Australia provides a pertinent comparison here with authoritative legal opinions,²⁵ endorsed by Australian national regulators,²⁶ predicting that litigation against directors for failure to consider climate-related risk “is likely to be only a matter of time.”²⁷

The Article proceeds as follows. Part I provides conceptual framing for the rest of the Article by situating the use of corporate and financial law to address climate change within debates in both corporate and environmental law over the role of corporations. It also introduces the value of comparing the United States and Australia in this context. Parts II through IV review legal and institutional developments and present our interview results and comparisons with Australia for each tool, with Part II covering disclosure, III covering engagement, and IV covering fiduciary duty. Part V provides suggestions for reforms.

I. THE ROLE OF CORPORATE AND SECURITIES LAW IN ADDRESSING CLIMATE CHANGE

In the past decade or so, the shape of corporate governance for U.S.

²⁴ Useful proposals include limits on lobbying and political spending, requiring at least one director with relevant environmental expertise, and requiring a more elaborate and formalized process for consulting with environmental, community, and other stakeholder groups on climate change, as well as other sustainability issues. *See infra* Section III.B.

²⁵ *See* NOEL HUTLEY & SEBASTIAN HARTFORD DAVIS, CTR. FOR POL’Y DEV. & FUTURE BUS. COUNCIL, CLIMATE CHANGE AND DIRECTOR’S DUTIES: MEMORANDUM OF OPINION (2016) [hereinafter HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM], <https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf> (considering the likelihood of physical “climate change risks” and concluding that such risks would likely be foreseeable in litigation against a company director); NOEL HUTLEY & SEBASTIAN HARTFORD DAVIS, CTR. FOR POL’Y DEV., CLIMATE CHANGE AND DIRECTORS’ DUTIES: SUPPLEMENTARY MEMORANDUM OF OPINION (2019) [hereinafter HUTLEY & HARTFORD DAVIS, 2019 MEMORANDUM], <https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016.pdf>.

²⁶ *See, e.g.*, John Price, Comm’r, Austl. Sec. & Invs. Comm’n, Keynote Address at the Centre for Policy Development: Financing a Sustainable Economy (June 18, 2018) (encouraging directors to lead corporate governance reform to manage issues like climate change and noting that “directors would do well to carefully consider the memorandum of opinion by Noel Hutley QC and Sebastian Hartford Davis on climate change and directors duties . . . that, in our view, the opinion appears legally sound and is reflective of our understanding of the position under the prevailing case law in Australia in so far as directors’ duties are concerned”); Sean Hughes & Cathie Armour, Comm’rs, Austl. Sec. & Invs. Comm’n, Address at ANU Climate Update (Feb.–Mar. 2019) (highlighting that directors who fail to consider climate change risks now could be liable for breaching fiduciary duties in the future, again favorably referring to the Hutley and Hartford Davis memorandum).

²⁷ HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25, at para. 51.

public corporations has altered dramatically, with initiatives surrounding climate change playing a central role. Environmental, Social, and Governance (ESG) activism has exploded as a major part of shareholder formal and informal engagement.²⁸ Multiple disclosure initiatives, focused on climate change in particular and sustainability more generally, have expanded, with sustainability reports becoming a standard part of corporate disclosure.²⁹

These developments can be situated within a long-running and evolving debate over the nature and purpose of business corporations. They also reflect growing social and political recognition of the urgency of addressing climate change. The developments described here are taking a particular form within the United States, but they are occurring at public companies around the world as well, with close parallels in similarly situated carbon economies such as Australia.

This Part frames the rest of the Article by providing background on debates within corporate governance and environmentalist circles concerning the relationship between climate change and corporations. Section A describes the evolving debate over the nature and purpose of United States corporations. Section B explores why environmentalists concerned about climate change have turned to using these securities and corporate law tools and their varying views of them. Section C discusses features of company law and governance in Australia and discusses some benefits from comparing emerging practices in these two similarly situated countries.

A. *The Corporate Governance Debate*

The proper purpose of corporations, especially public corporations, and the related question of to whom the fiduciary duties of corporate directors and officers do and should run, have been a source of several cycles of public and scholarly debate over the past century. The *locus classicus* of this debate is an exchange between Adolf Berle and Merrick Dodd in the Harvard Law Review in the early 1930s. Berle, a major New Deal figure and co-author of the book first analyzing the separation of ownership and control in public corporations, argued that directors and officers have a duty to protect the interests of shareholders.³⁰ Dodd countered that their duty runs to the corporation more broadly, including the interests of other stakeholders and

²⁸ Tamas Barko, Martijn Cremers & Luc Renneboog, *Shareholder Engagement on Environmental, Social, and Governance Performance* 1 (Eur. Corp. Governance Inst. Finance Working Paper, Paper No. 509/2017, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977219.

²⁹ Hans B. Christensen, Lutz Hail & Christian Leuz, *Adoption of CSR and Sustainability Reporting Standards: Economic Analysis and Review* 30 (Nat'l Bureau of Econ. Resch., Working Paper No. 26169, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439179.

³⁰ A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365 (1932).

the public in general.³¹

The managerialist ideology of the fifties seemed to reflect a victory for Dodd's view, as Berle recognized.³² But in the seventies and eighties, Berle's shareholder conception became dominant. This was driven by the rise of corporate raiders who launched hostile takeovers of poorly run businesses. A wave of economists and legal scholars argued that a focus on shareholder value would maximize the general welfare, at least within properly functioning markets constrained by laws that countered major external effects.³³ Milton Friedman made the case most famously in a short and elegant essay in the *New York Times Magazine*.³⁴ Some scholars, though, criticized this view, asserting the broader stakeholder vision of Dodd, and many states adopted corporate constituency statutes that allowed directors and officers to consider the interests of a variety of stakeholders, including employees, creditors, customers, the environment, and the community.³⁵

In the last two decades or so, two different sorts of shareholder activism have embodied the tension between the shareholder and stakeholder positions. On the one hand, a group of equity funds have followed a strategy of identifying poorly performing companies, buying up a substantial share position in them, and then pressuring management to take actions that the activists believe will increase returns to shareholders.³⁶ On the other hand is the growth of the type of ESG activism discussed here, which addresses

³¹ E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147–48 (1932).

³² ADOLF A. BERLE, JR., *POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* 8 (1959).

³³ For some of these scholars' insights, see FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 36–38 (1991); Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2031 (1993); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 910–12 (2005); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

³⁴ Milton Friedman, *A Friedman Doctrine--The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

³⁵ For these criticisms, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 278 (1999); LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 104–05 (2012); LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 185–86 (2001); KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES* 228–29 (2006); David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1013–14 (2013).

³⁶ See, e.g., Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1093 (2015) (discussing whether interventions by activist hedge funds have long-term detrimental effects on companies and shareholders and concluding that there is not sufficient support for that theory); John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 553–54 (2016) (“[O]ur primary concern is . . . with the possibility that the increasing rate of hedge fund activism is beginning to compel corporate boards and managements to forego long-term investments (particularly in R&D) in favor of a short-term policy of maximizing shareholder payout in the form of dividends and stock buybacks.”).

environmental and social concerns.

Many proponents of ESG proposals and disclosure do not take a firm position on the stakeholder side of the debate. Instead, they argue that a focus on long-term shareholder value is consistent with, and indeed requires, aggressive consideration of a variety of stakeholder interests. Typical of this attempt to reconcile shareholders and stakeholders through a focus on the long run are recent annual letters from Larry Fink, the CEO of BlackRock, one of the Big Three family of mutual funds that has come to play a huge role in the ownership of public corporations.³⁷ In his recent letter to CEOs, Fink specifically focused on climate change: “Our investment conviction is that sustainability- and climate-integrated portfolios can provide better risk-adjusted returns to investors. And with the impact of sustainability on investment returns increasing, we believe that sustainable investing is the strongest foundation for client portfolios going forward.”³⁸

Fink is far from alone in this view. A large number of both investors and companies have publicly taken similar positions. For an example of the view expressed from the company side, consider this statement from the Sustainability Report of Prologis, the highest-rated U.S. corporation on the Global 100 Most Sustainable Companies list:³⁹ “Our ESG program is good business—benefiting our customers, investors, communities and employees. Good ESG practices support our corporate commitment to enduring excellence and advance our longstanding focus on exemplary customer service.”⁴⁰

Why might a long-term focus help reconcile shareholder with stakeholder interests? Several sorts of arguments are made in the context of climate change. For many companies, climate change already is imposing costs that require action, and for others it presents new business opportunities. Another reason companies may need to focus on climate change now is the threat of potentially much stronger regulation in the relatively near future. Particularly for companies in energy and related fields, which must make long-term investment decisions, the profitability of those investments may shift dramatically with potential new regulations.⁴¹

Reputational concerns may also drive companies to consider stakeholder interests.⁴² The more weight decisionmakers give to the future

³⁷ Larry Fink, *Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter> (last visited Mar. 21, 2021).

³⁸ *Id.*

³⁹ *2019 Global 100 Results*, CORP. KNIGHTS (Jan. 22, 2019), <https://www.corporateknights.com/reports/2019-global-100/2019-global-100-results-15481153/>.

⁴⁰ PROLOGIS, SUSTAINABILITY REPORT: A CULTURE OF RESILIENCE 4 (2017), https://prologis.getbynder.com/m/10c8bf7b4af3adfl/original/Prologis_2017_SustainabilityReport_180530_FINAL.pdf.

⁴¹ See Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 40 (2020) (discussing effects of long-term climate prediction assessments on investors).

⁴² See Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 694 (2018) [hereinafter Hill, *Caremark as Soft Law*] (“[C]ompliance programs go far beyond what is needed to avoid lawbreaking, and what directors do... goes far beyond what is needed to avoid liability, incorporating, among other

profitability of the business, the more important reputation becomes. Many consumers increasingly choose what companies to patronize, or not patronize, based in part on their sense of how well those companies conform to their personal values.⁴³ Reputation with potential employees also matters to many businesses, and highly-skilled employees may increasingly care about climate change.⁴⁴ However, even if all of the concerns above are correct, one must also make a case for why managers are not already fully taking them into account and hence why shareholder activism or litigation could help, e.g., by addressing agency costs or market imperfections.

Engagement with stakeholders may also have informational benefits. Scientists and other environmentalists who are deeply engaged in and knowledgeable about the issue of climate change may be able to help companies evaluate potential effects from climate change. Employees and customers may have helpful ideas about how a company can reform its operations. Local community leaders and organizations may help businesses become aware of environmental impacts they are having in the places where they are located.

A further effect, beyond a long-term focus on the returns of individual companies, may reconcile shareholder and stakeholder interests. Many institutional investors, the owners of most shares of public companies, are highly diversified in their share ownership. They thus care about the effect that the behavior of one company may have on the long-term profits of their other portfolio companies. Even if a utility company may generate greater profits by building more fossil fuel plants, if the resulting greenhouse gas (GHG) emissions hurt the profits of other companies more, a diversified investor will not want to see those plants built. This portfolio effect helps internalize major externalities such as GHG emissions.⁴⁵

things, concerns about reputation, both theirs and their company's."); Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193, 1194, 1204 nn.43 & 45 (2019) (exploring corporate motivation for gaining reputational benefits).

⁴³ LAWRENCE B. GLICKMAN, *BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA* 3 (2009); Debbie Kasper, *Contextualizing Social Practices: Insights into Social Change*, in *PUTTING SUSTAINABILITY INTO PRACTICE: APPLICATIONS AND ADVANCES IN RESEARCH ON SUSTAINABLE CONSUMPTION* 41 (Emily Huddart Kennedy, Maurie J. Cohen & Naomi T. Krogman eds., 2015).

⁴⁴ See, e.g., Fink, *supra* note 37 ("Attracting and retaining the best talent increasingly requires a clear expression of purpose. With unemployment improving across the globe, workers, not just shareholders, can and will have a greater say in defining a company's purpose, priorities, and even the specifics of its business. Over the past year, we have seen some of the world's most skilled employees stage walkouts and participate in contentious town halls, expressing their perspective on the importance of corporate purpose. This phenomenon will only grow as millennials and even younger generations occupy increasingly senior positions in business. In a recent survey by Deloitte, millennial workers were asked what the primary purpose of businesses should be – 63 percent more of them said 'improving society' than said 'generating profit.'").

⁴⁵ Condon, *supra* note 41, at 43. A new nonprofit has been formed to advocate that investors with diversified portfolios should take this effect into account, allowing them to advocate planet-friendly policies. *Our Story*, S'HOLDER COMMONS, <https://theshareholdercommons.com/about/#our-story> (last visited Mar. 22, 2021).

For these reasons among others, the prevalent long-term value mantra may go a long way to reconciling the interests of shareholders with other stakeholders, including the interests of all persons in reducing the impact of climate change. However, this consensus is challenged from opposing directions.

On one side are shareholder proponents who believe that ESG activism has gone too far, and that much of the time following what ESG believers propose would harm shareholder interests.⁴⁶ These proponents can accept that good business reasons may justify addressing climate risks but deny that shareholders or courts can improve upon the judgment of managers. This may be because ESG proponents know much less about what is going on within a business than its directors and officers. Some shareholder proponents also worry that some ESG proponents may be using the long-term mantra to hide the true motivation of their agenda, namely, to co-opt the mechanisms of corporate governance to reduce climate change even if doing so damages the companies involved. These shareholder proponents go back to the gospel of Milton:⁴⁷ if GHG emissions are imposing major external effects on the world, the proper response is with legislation to stop it, such as a carbon tax or a cap-and-trade program.

A related criticism is that internal power remains focused on shareholders, who are the sole constituents who elect the board and have the power to sue over fiduciary duty violations. Director and officer compensation also remain focused on shareholder value, and the prospects of officers are naturally tied to the economic success of their business. All that means that we should expect directors and officers to remain tied to the interests of shareholders. Most other constituencies have both no power and also very limited knowledge about the operations of most businesses. Insofar as businesses spotlight the interests of others, we should expect it to be mostly for show.⁴⁸

⁴⁶ Some have taken to direct counteraction against climate change shareholder action. *See About, BURN MORE COAL*, <https://burnmorecoal.com/> (describing themselves as “a pro-coal electric utility shareholder activist group dedicated to promoting the increased use of coal as a fuel for electricity generation”); *see also* Stephen M. Bainbridge, *Corporate Purpose in a Populist Era* 1, 7 (UCLA Sch. of L., Law & Econ. Rsch. Paper No. 18-09, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237107 (explaining the populist perspective on corporate activist policies).

⁴⁷ Friedman, *supra* note 34, at 33.

⁴⁸ The former Chief Justice of the Delaware Supreme Court, Leo E. Strine, Jr., has argued that this concentration of corporate power on shareholders alone is the main reason why we should expect the duty of directors to run to shareholders. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 772 (2015); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147–48 (2012). Note, Strine’s personal opinions do not necessarily coincide with this existing legal structure. He has advocated various reforms to increase protection for employees in corporate governance. *See generally* Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America’s Future* (Harv. L. Sch. Discussion Paper

A different critique comes from the side of stakeholder proponents. These proponents agree with the Friedmanite critique that corporations as currently constituted are unfit to become much more aggressive in addressing climate change. However, these stakeholder-side critics are skeptical that legislative or regulatory responses will be forthcoming at the scale and on a timeline that is adequate to the challenge. Governments are captured by the very shareholder-centered companies that are causing the problem, and even if they had the will, they lack the resources necessary to enforce rules adequately were they able to enact them. Addressing climate change thus requires an enormous voluntary mobilization by businesses, but current corporations will not mobilize nearly actively enough. Corporations must therefore themselves be reformed, in their purposes, duties, and power structure, so as to represent stakeholder interests adequately, including our shared interest in addressing climate change.⁴⁹

Thus, three basic positions have emerged regarding the role that non-shareholder-focused interests, including the public interest in averting climate change, should play in corporate decisionmaking. All positions aim ultimately at improving social welfare, but they disagree as to what role corporations should play in doing so. The shareholder wealth maximization position that has dominated in the United States draws on the Smithian invisible hand idea:⁵⁰ within functioning markets, firm profit maximization should maximize social welfare, with legal intervention as needed to address externalities that may make prices inadequate signals of true social costs.⁵¹ The stakeholder position holds that markets and legal interventions are not enough, and that we need corporations to consciously pursue the general good, not just profits.⁵² The long-term shareholder position tries to reconcile the two extremes.⁵³

B. *The Environmental Debate*

Just as a triad of positions have emerged among corporate governance scholars regarding the proper role of companies in addressing issues of broad public interest like climate change, a similar variation of opinion has arisen

No. 1018, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924 (proposing reforms to corporate governance because corporations act in accordance with short-term goals and do not match the needs of human investors).

⁴⁹ See generally COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES (Beate Sjøfjell & Benjamin J. Richardson eds., 2015) (canvassing ideas and proposals for furthering sustainable companies with the final chapter proposing reform ideas for law to stimulate environmentally sustainable companies).

⁵⁰ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R. H. Campbell, A. S. Skinner & W. B. Todd eds., Liberty Classics ed. 1981).

⁵¹ Friedman, *supra* note 34, at 36.

⁵² Benjamin J. Richardson & Beate Sjøfjell, *Capitalism, the Sustainability Crisis, and the Limitations of Current Business Governance*, in COMPANY LAW AND SUSTAINABILITY, *supra* note 49, at 1.

⁵³ Fink, *supra* note 38.

among environmental scholars and activists. Environmental scholars and activists approach the issue not from the perspective of corporate governance but rather from what strategies and laws are most effective to deal with the looming climate crisis. The Paris Climate Agreement, concluded in 2015, sets out a clear, science-based goal for what is necessary to prevent dangerous climate change: holding global average temperature rises to well below two degrees Celsius over pre-industrial levels and pursuing efforts to keep temperature rises to no more than 1.5 degrees Celsius.⁵⁴ The premier climate science body globally—the Intergovernmental Panel on Climate Change (IPCC)—advised in a 2018 report that achieving this goal requires “rapid and far-reaching transitions” across all economic sectors.⁵⁵

For some environmental scholars and activists, corporations—particularly fossil fuel corporations—are an obstacle to achieving this goal, rather than a part of the solution. For example, some of the key leaders of the “climate justice” movement, which has gained considerable momentum in recent years, aim to reduce emissions through targeting major corporate emitters of GHGs. Writing in 1999, the non-governmental organization (NGO) CorpWatch described the ultimate aim of the then nascent climate justice movement as “holding fossil fuel corporations accountable for the central role they play in contributing to global warming.”⁵⁶ In the early 2000s, U.S. lawsuits such as *Kivalina* and *Comer* featured plaintiffs (unsuccessfully) seeking to attribute legal responsibility for climate change harms to major oil companies.⁵⁷ More recently, there has been another eruption of climate justice lawsuits brought against both governments and companies in the United States and in other countries.⁵⁸

Those in the climate justice movement with this perspective have used a variety of legal and campaigning strategies in their efforts to pursue accountability for climate-related damage, ranging from large-scale protests

⁵⁴ Paris Agreement, *supra* note 2, art. 2(1)(a).

⁵⁵ IPCC, GLOBAL WARMING OF 1.5°C: AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS AND RELATED GLOBAL GREENHOUSE GAS EMISSION PATHWAYS, IN THE CONTEXT OF STRENGTHENING THE GLOBAL RESPONSE TO THE THREAT OF CLIMATE CHANGE, SUSTAINABLE DEVELOPMENT, AND EFFORTS TO ERADICATE POVERTY 15 (Valérie Masson-Delmotte, Hans-Otto Pörtner, Jim Skea, Panmao Zhai, Debra Roberts, Priyadarshi R. Shukla, Anna Pirani, Roz Pidcock, Yang Chen, Elisabeth Lonnoy, Wilfran Moufouma-Okia, Sarah Connors, Xiao Zhou, Tom Maycock, Melinda Tignor, Clotilde Péan, J.B. Robin Matthews, Melissa I. Gomis & Tim Waterfield eds., 2018).

⁵⁶ *What is Climate Justice?*, CORPWATCH (Nov. 1, 1999), <https://corpwatch.org/article/what-climate-justice>.

⁵⁷ *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012); *Comer v. Murphy Oil USA*, 607 F.3d 1049, 1055 (5th Cir. 2010).

⁵⁸ Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 843 (2018); JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 27 (2020).

and disruptive actions to legislative advocacy and litigation.⁵⁹ In addition to direct action against fossil fuel companies, some advocates and organizations, such as 350.org, have encouraged institutional investors, like universities, pension funds, churches, and other large charities, to divest their shareholdings in fossil fuel companies.⁶⁰ The movement has also accused companies, particularly in the fossil fuel industry, of seeking to undermine the findings of climate science and to block progressive regulatory efforts to advance climate policy.⁶¹ Although some of these advocates simply target fossil fuels, others argue more broadly that unrestrained capitalism—represented by profit-driven corporate interests—is to blame for the majority of GHG pollution.⁶²

A second set of environmental scholars and advocates—agreeing with the need to reduce corporate greenhouse gas emissions—has focused on the need for corporate and financial law to be reformed to give needed weight to the critical value of sustainability. These scholars generally identify with the stakeholder approach in the corporate governance literature, and focus on reforms to companies, as well as laws and principles governing investment, that could incentivize a greater focus on ESG issues.⁶³ This may include reforms to corporate disclosure requirements to mandate disclosure

⁵⁹ See environmental movements such as Extinction Rebellion, EXTINCTION REBELLION, <https://rebellion.global/about-us/> (last visited Sept. 18, 2020), and Fridays for Future, FRIDAYS FOR FUTURE, <https://fridaysforfuture.org/what-we-do/who-we-are/> (last visited Sept. 18, 2020). See also the 2015 *Urgenda* case, upheld on appeal to the Hague Court of Appeal and the Supreme Court of the Netherlands, in which the court found that the Dutch state had breached its duty of care by failing to adopt sufficiently ambitious reduction targets. Rb.'s-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. Ch. W. Backes (Stichting Urgenda/Staat der Nederlanden). This finding was upheld on appeal and then again by the Supreme Court of the Netherlands on the basis that the state had violated rights protected by the European Convention on Human Rights by which the Netherlands is bound. HR 20 December 2019, NJ 2020, 41 m.nt. J. Spier (De Staat der Nederlanden/Stichting Urgenda). In the United States, the plaintiffs in the *Juliana* case asserted that the federal government violated their constitutional and public trust rights by burning fossil fuel. In 2016 Judge Aiken of the District of Oregon denied motions to dismiss the action, finding that there is a fundamental right to a climate system capable of sustaining human life. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016). But on January 17, 2020, a Ninth Circuit panel by majority reversed Judge Aiken's decision on the basis of a lack of standing. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). The plaintiffs subsequently filed a petition for rehearing *en banc*, which was denied. Petition for Rehearing *En Banc, Juliana*, 947 F.3d 1159 (No. 18-36082), *reh'g denied*, 986 F.3d 1295 (9th Cir. 2021).

⁶⁰ *About 350*, 350, <https://350.org/about/#values> (last visited Sept. 18, 2020); see also Neil Gunningham, *Building Norms from the Grassroots Up: Divestment, Expressive Politics, and Climate Change*, 39 LAW & POL'Y 372, 372 (2017) (discussing 350.org's mission).

⁶¹ NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 6–7 (2010); Gunningham, *supra* note 60, at 381.

⁶² Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229, 238 (2014); Peter C. Frumhoff, Richard Heede & Naomi Oreskes, *The Climate Responsibilities of Industrial Carbon Producers*, 132 CLIMATIC CHANGE 157, 166–67 (2015).

⁶³ COMPANY LAW AND SUSTAINABILITY, *supra* note 49, at xvi; ELISA MORGERA, *CORPORATE ACCOUNTABILITY IN INTERNATIONAL ENVIRONMENTAL LAW* 20 (2009).

of environmental risks such as climate change,⁶⁴ all the way up to the introduction of new corporate forms that allow a primary ESG-related objective beyond the usual focus on shareholder profit.⁶⁵

Like the convergence between shareholder and stakeholder approaches described above, we also see the emergence of what might be termed a “pragmatic middle” position on the role of companies in addressing climate change in environmental scholarship and practice.⁶⁶ Those adopting this approach seek to persuade corporations, as they are currently configured, to do more to address climate change on the basis that this can also serve corporate interests where climate change poses material business risks.⁶⁷ For example, Professor Sarah Light’s recent article, *The Law of the Corporation as Environmental Law*, argues that we should embrace corporate law requirements as part of the “environmental law toolkit,” using these nontraditional levers to encourage company action to address pressing environmental issues, including climate change.⁶⁸ Authors such as Professors Michael Vandenbergh and Jonathan Gilligan in their book, *Beyond Politics: The Private Governance Response to Climate Change*, take an even more robust stance, arguing that private sector action on climate change provides a promising alternative to waiting for governments to make progress on the issue.⁶⁹

⁶⁴ See, e.g., Anita Foerster, Jacqueline Peel, Hari Osofsky & Brett McDonnell, *Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia*, 35 CO. & SEC. L.J. 154, 154 (2017) (examining current disclosure practices related to climate risks in Australia and suggesting reform options); Cary Di Lernia, *Strange Bedfellows? Climate Change, Carbon Risk, and the Regulation of Corporate Disclosure*, 36 CO. & SEC. L.J. 221, 221 (2018) (discussing opportunities to improve disclosure of climate risks); Natalie Nowiski, *Rising Above the Storm: Climate Risk Disclosure and Its Current and Future Relevance to the Energy Sector*, 39 ENERGY L.J. 1, 2 (2018) (discussing the lack of mandatory climate risk disclosure reporting in the United States and recommending reform options).

⁶⁵ Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77, 78 (2018) [hereinafter McDonnell, *From Duty and Disclosure*]; Brett H. McDonnell, *Benefit Corporations and Public Markets: First Experiments and Next Steps*, 40 SEATTLE U. L. REV. 717, 717 (2017); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 591 (2011).

⁶⁶ The authors have articulated this view in previous work. See, e.g., Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 695 (2016) (discussing strategies for advancing bipartisan action, economic alignment, and corporate action); Osofsky et al., *Energy Re-Investment*, *supra* note 4, at 606 (analyzing strategies for shifting energy investment and encouraging energy reinvestment); See also SARAH BARKER, COMMONWEALTH CLIMATE & L. INITIATIVE, DIRECTORS’ LIABILITY AND CLIMATE RISK: AUSTRALIA – COUNTRY PAPER 3 (2018) (acknowledging the material risks of climate change and suggesting corporate options to address the issues); Sarah Barker, Mark Baker-Jones, Emilie Barton & Emma Fagan, *Climate Change and the Fiduciary Duties of Pension Fund Trustees—Lessons from the Australian Law*, 6 J. SUSTAINABLE FIN. & INV. 211, 211 (2016) (suggesting that climate change should be considered a financial issue).

⁶⁷ Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 146 (2019).

⁶⁸ *Id.* at 149.

⁶⁹ MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE* 3–4 (2017).

Those working to advance this approach have a variety of perspectives on corporations and on the appropriate strategy for deploying tools from this “environmental toolkit.” This pragmatic middle position is sometimes held in conjunction with some variation on the first two positions, with these efforts treated as crucial complementary strategies given current partisan political dynamics.⁷⁰ For instance, some environmental groups embracing this middle-ground position do so through an engagement-focused strategy conducted in the shadow of the threat of litigation if companies do not step up their game on climate change.⁷¹ A leading example is the U.K.-based environmental NGO, ClientEarth, whose corporate and financial law program includes efforts both to educate companies about climate business risk and also to develop shareholder lawsuits against companies which fail to monitor and manage these risks adequately.⁷²

In addition, the “pragmatic middle” position is a nuanced one because corporations and investors vary significantly in how they approach the problem of climate change and interact with the environmental community. Even within the fossil fuel industry, companies have positioned themselves differently with respect to how the energy transition needed interacts with their bottom line. This variation is particularly strong among oil and gas companies, many of which market natural gas as a transitional fuel and have invested significantly in renewable energy.⁷³ Some fossil fuel companies have been actively involved in corporate climate change efforts, including sending representatives to the international climate change negotiations, opposing the Trump Administration’s withdrawal from the Paris Agreement, and the Biden Administration’s rejoining it.⁷⁴

⁷⁰ Osofsky & Peel, *supra* note 66, at 794.

⁷¹ *Why the Law*, CLIENTEARTH, <https://www.clientearth.org/how-we-work/why-the-law/> (last visited Mar. 24, 2021).

⁷² *Id.*

⁷³ Analysts have highlighted that European oil and gas companies are outpacing their U.S. rivals. See, e.g., Ron Bousso, *Big Oil Spent 1 Percent on Green Energy in 2018*, REUTERS (Nov. 11, 2018, 7:06 PM), <https://www.reuters.com/article/us-oil-renewables/big-oil-spent-1-percent-on-green-energy-in-2018-idUSKCN1NH004> (explaining European companies’ expenditures on renewable efforts); Timothy Abington & Kelly Gilblom, *Shell Leads Big Oil in the Race to Invest in Clean Energy*, BLOOMBERG (Sept. 4, 2019, 6:11 AM), <https://www.bloomberg.com/news/articles/2019-09-04/shell-leads-big-oil-in-the-race-to-invest-in-clean-energy-tech> (“European majors closed seven times as many deals with renewable-electricity and storage companies as their U.S. counterparts since 2010.”).

⁷⁴ See, e.g., *Thousands of Big Energy Reps at UN Climate Talks: Monitor*, FRANCE24 (June 21, 2019, 1:50 AM), <https://www.france24.com/en/20190621-thousands-big-energy-reps-un-climate-talks-monitor> (“The International Emissions Trading Group (IETA), which counts among its members energy giants such as BP, Chevron and Shell, has sent 1,817 delegates to COPs and inter-sessional meetings since 2000, according to the attendees list.”); Rebecca Elliott & Bradley Olson, *Oil Companies, Pushed to Address Climate, Disagree on How*, WALL ST. J. (Sept. 22, 2019, 5:30 AM), <https://www.wsj.com/articles/oil-companies-pushed-to-address-climate-disagree-on-how-11569144602> (reporting that ExxonMobil, Shell, and BP will participate in U.N. climate talks); Alanna Petroff, *Big Business Wants Trump to Stick with Paris Climate Accord*, CNN (May 29, 2017, 12:29 PM), <https://money.cnn.com/2017/05/29/news/trump-paris-climate-change-business/> (explaining that Chevron, ExxonMobil, and other large companies opposed President Trump’s decision to withdraw from the Paris

The Paris Agreement negotiations and responses to President Trump and President Biden's rejoining exemplify this complexity. Those negotiations featured an unprecedented level of engagement with business interests, including some fossil fuel companies and investors in them.⁷⁵ Many of these companies and investors, including energy companies, opposed President Trump's Paris Agreement withdrawal, and committed—together with other stakeholders—to action as part of the We Are Still In initiative.⁷⁶ Additional, parallel private sector initiatives, such as the We Mean Business Coalition⁷⁷ and the G20 Taskforce on Climate-Related Financial Disclosures (TCFD),⁷⁸ have continued to gain momentum following the Paris Agreement. Over 300 businesses and investors from the We Mean Business Coalition wrote an open letter to President Biden in April 2021 praising his rejoining the Paris Agreement, and calling for a national "target of cutting GHG emissions by at least 50% below 2005 levels by 2030."⁷⁹ Both prominently feature corporate and investor stakeholders seeking to embed the management of climate change-related business risks as a matter of standard practice for companies.⁸⁰

These initiatives are complemented by efforts of shareholder advocacy and investor groups in the United States and other countries that advocate for corporate leadership on sustainability issues, often based on a program of shareholder activism and engagement with companies. A prominent U.S. example is Ceres, which describes its purpose as follows:

Ceres is a sustainability nonprofit organization working with the most influential investors and companies to build leadership and drive solutions throughout the economy. Through powerful networks and advocacy, Ceres tackles the world's

Agreement); Laura Hurst, *Shell CEO Hopeful Biden Will Speed Up Climate Change Fight*, HOUSTON CHRON. (Dec. 4, 2020) (calling President Biden rejoining the Paris Agreement a "pretty good start").

⁷⁵ Ilario D'Amato, *Marc Bolland, CEO, M&S: COP21 a "Turning Point" Thanks to Business Engagement and Demand*, CLIMATE GRP. (Dec. 6, 2015), <https://www.theclimategroup.org/what-we-do/news-and-blogs/cop21-a-turning-point-thanks-to-business-engagement-and-demand-marc-bolland-ceo-mands>.

⁷⁶ *Businesses & Investors*, WE ARE STILL IN, <https://www.wearestillin.com/businesses-investors> (last visited Sept. 24, 2020); Richard Luscombe, *Top US Firms Including Walmart and Ford Oppose Trump on Climate Change*, GUARDIAN (Dec. 1, 2017, 11:32 AM), <https://www.theguardian.com/environment/2017/dec/01/trump-climate-change-paris-withdrawal-ford-walmart>.

⁷⁷ *What We Do*, WE MEAN BUS. COAL., <https://www.wemeanbusinesscoalition.org/about/> (last visited Sept. 24, 2020).

⁷⁸ *About the Task Force*, TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, <https://www.fsb-tcfd.org/about/> (last visited Sept. 24, 2020).

⁷⁹ We Mean Business Coalition, Press Release, 310 Businesses and Investors Support U.S. Federal Climate Target in Open Letter to President Biden, <https://www.wemeanbusinesscoalition.org/press-release/businesses-investors-support-u-s-federal-climate-target-open-letter-president-biden/> (Apr. 13, 2021).

⁸⁰ See, e.g., TCFD, FINAL REPORT, *supra* note 7, at 1–2 (responding to calls from a range of financial market participants for decision-useful, climate-related information, the industry-led Task Force developed a framework for climate-related financial disclosures).

biggest sustainability challenges, including climate change, water scarcity and pollution, and inequitable workplaces.⁸¹

Those working in this middle-ground space thus include a wide array of actors, from environmental organizations and individual advocates, to corporations and investors, and non-profit organizations.

Accordingly, we see three—at times interrelated—positions developing in the environmental community on the role that companies should play in averting dangerous climate change. All positions aim ultimately at achieving climate change mitigation goals, such as the Paris Agreement's two degrees target, and advocate for the need for corporate behavioral change. But there is disagreement as to how to position corporations in that effort. The first position treats corporations as actors—and for some taking this position, bad actors—who need to be held accountable, including through litigation, for their major role in harming the global climate system. The other positions see a role for corporations as part of the solution to climate change. According to the second position, this will require an agenda of law and corporate governance reform to align corporate interests more closely with broader environmental stakeholder interests. Under the third position, a middle-ground approach using existing law is preferable, at least in the short-term, as a way of encouraging corporate action to address climate change, based on the threats it poses to businesses' financial bottom-lines.

None of these positions are necessarily in conflict with one another, other than at the extremes, such as between those who oppose entirely working with corporations and those who are engaging corporations in developing solutions to climate change. Many advocates support a multi-pronged approach, which might include corporate accountability litigation, legal reform, and collaborative work with corporations. After exploring current practices in Parts II through IV, we will explore what such an inclusive multi-pronged approach might look like in Part V.

C. *The Value of a Comparative Conceptual Approach*

Because climate change is a transnational and international problem, the Article takes a comparative approach. With a particular focus on Australia, the Article's assessment provides recommendations so that the United States can benefit from what has been tried in other places. Other countries have also faced the challenge of how to address the role of private sector companies in addressing public interest issues, such as climate change. The different positioning of viewpoints across the corporate governance and environmental communities described above is replicated in the scholarship and practice of a number of other developed countries.⁸² Some countries, particularly in

⁸¹ *About Us*, CERES, <https://www.ceres.org/about-us> (last visited Sept. 24, 2020).

⁸² See, e.g., Beate Sjøfjell, *Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation*, 8 EUR. CO. L. 56, 56 (2011) (detailing the Corporate Social

Europe, are developing far-reaching corporate law reforms that carve out a central role for ESG considerations in corporate governance.⁸³ However, in others, no firm position has been reached on corporate governance and climate change, paralleling the U.S. approach. In this respect, Australia provides a useful comparison to the United States for three key reasons.

First, like the United States, Australia has a carbon-driven economy. It is highly dependent on fossil-fuel exports as a principal source of income,⁸⁴ and has electricity-generation and transportation systems dominated by fossil fuel energy sources.⁸⁵ Moreover, of the top 300 companies listed on the Australian Stock Exchange (ASX), over half have high exposure to climate risk.⁸⁶ These factors make regulation to address climate change a

Responsibility debate in the EU); Lisa Benjamin & Stelios Andreadakis, *Corporate Governance and Climate Change: Smoothing Temporal Dissonance to a Phased Approach*, 40 BUS. L. REV. 146, 146 (2019) (advocating for a phased approach to climate risk disclosures in the UK); Janet Dine, *Corporate Regulation, Climate Change and Corporate Law: Challenges and Balance in an International and Global World*, 26 EUR. BUS. L. REV. 173, 174 (2015) (comparing UK and Albanian approaches to directors duties and detailing effects on corporate responsibility resulting from Albanian law that allows lifting of corporate veils); Benjamin J. Richardson, *Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment*, 46 OSGOODE HALL L.J. 243, 244–45 (2008) (discussing potential environmental regulation approaches for Canada, the U.S., and Europe stemming from socially responsible investment).

⁸³ See *supra* note 22; *Communication from The Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth*, at 1, COM (2018) 97 final (Aug. 3, 2018) (detailing the European Commission's action plan to comply with the goals set by the Paris Agreement). For a broader overview of these reforms, see *Sustainable Finance*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance_en (last visited Mar. 25, 2021). An example of this type of reform is the French Energy Transition Law, introduced in 2015, which requires listed companies to report on financial risks linked to the effects of climate change and the measures that the company takes to reduce such effects by implementing a low-carbon strategy in all components of its business. AMY MASON, WILL MARTINDALE, ALYSSA HEATH & SAGARIKA CHATTERJEE, *PRINCIPLES FOR RESPONSIBLE INV., FRENCH ENERGY TRANSITION LAW: GLOBAL INVESTOR BRIEFING 7* (2016) [hereinafter *FRENCH ENERGY TRANSITION LAW*].

⁸⁴ Australia's mining sector accounted for 8.7% of the country's GDP in 2019 and 28% of its GDP growth in 2019. Resource and energy commodity exports are forecasted to earn \$299 billion in 2019–20. OFF. OF THE CHIEF ECONOMIST, *RESOURCES AND ENERGY QUARTERLY* 4, 6 (2020). The Australia Institute analysis categorizes Australia as the world's third largest fossil fuel exporter. TOM SWANN, *THE AUSTRAL. INST., HIGH CARBON FROM A LAND DOWN UNDER: QUANTIFYING CO₂ FROM AUSTRALIA'S FOSSIL FUEL MINING AND EXPORTS 2* (2019).

⁸⁵ In 2017–18, “fossil fuels (coal, oil and gas) accounted for 94 per cent of Australia's primary energy mix.” DEP'T OF THE ENV'T & ENERGY, *AUSTRALIAN ENERGY UPDATE 2019*, at 8 (2019). Fossil fuels contributed to 81% of total electricity generation in 2018, with coal accounting for 60% of total generation and gas-fired generation representing 19% of total generation. *Id.* at 28. Further, transport constituted the largest consumer of energy, with road and air transport accounting for 71% and 20% of energy consumption, respectively. *Id.* at 13.

⁸⁶ MKT. FORCES, *OUT OF LINE, OUT OF TIME 2* (2019). For energy and electricity-generation companies, climate risk is primarily transitional risk associated with the potential for increasing regulation of carbon emissions and the risk of stranded assets. However, Australian companies also have significant exposure to physical climate risk, given the country's hot, dry climate and particular vulnerability to climate change-fuelled extreme weather events like heatwaves, wildfires and flooding. See Narelle Hooper, *3 Major Areas of Concern for Climate Risk in Australia*, AUSTRAL. INST. CO. DIR. (May 1, 2019), <https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-editions/may/climate-risk> (detailing the risks that climate change poses for companies).

central issue of economic importance and corporate concern in Australia, as in the United States.

Second, Australia offers a socio-political and cultural context that is perhaps the most closely aligned with the United States of any country worldwide. This is particularly so when it comes to the issue of climate change, which has produced strong partisan divides and national legislative paralysis similar to that seen in the United States.⁸⁷ Australia briefly experimented with a carbon tax in the early 2010s,⁸⁸ which was effective in lowering energy-related GHG emissions,⁸⁹ but this was repealed by an incoming conservative government.⁹⁰ In the aftermath, national climate regulatory proposals have stalled,⁹¹ leading environmental activists to focus on other avenues for achieving progress, including changes in corporate behavior.

Finally, Australia shares a similar corporate and securities law framework to the United States, based in the Anglo-American corporate law tradition.⁹² Although relevant laws on disclosure, shareholder proposals, and directors' duties are by no means identical,⁹³ the general structure of laws and the dominance of the shareholder wealth-maximization view are shared by both the United States and Australia.⁹⁴ This means that efforts to use

⁸⁷ Hari M. Osofsky & Jacqueline Peel, *The Grass is Not Always Greener: Congressional Dysfunction, Executive Action, and Climate Change in Comparative Perspective*, 91 CHI.-KENT L. REV. 139, 140 (2016).

⁸⁸ *Clean Energy Act 2011* (Cth) (Austl.), as repealed by *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth) (Austl.).

⁸⁹ For analysis on the efficacy of the carbon tax, see Marianna O'Gorman & Frank Jotzo, *Impact of the Carbon Price on Australia's Electricity Demand, Supply and Emissions* 1 (Austl. Nat'l Univ., Working Paper 1411, 2014). For a broader review of Australia's climate change law over time, see Ilona Millar & Sophie Whitehead, *Climate Change Law in Australia—A History and the Current State of Play*, 92 AUSTL. L.J. 756, 756 (2018).

⁹⁰ *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth) (Austl.).

⁹¹ AUSTL. PANEL OF EXPERTS ON ENV'T L., CLIMATE LAW: TECHNICAL PAPER 5, 11 (2017). There is also more recent commentary on a possible "climate truce" following the COVID-19 pandemic. Matthew Warren, *Australian Politics Quietly Reaches a Truce in the Climate Wars*, AUSTL. FIN. REV. (July 6, 2020, 2:52 PM), <https://www.afr.com/policy/energy-and-climate/australian-politics-quietly-reaches-a-truce-in-the-climate-wars-20200706-p559b4>.

⁹² JOHN FARRAR, CORPORATE GOVERNANCE THEORIES, PRINCIPLES AND PRACTICE 5 (3d. ed. 2008).

⁹³ A key distinction is that the concept of "fiduciary duties" in Australia differs from that in the United States, though there are duties owed by directors who are fiduciaries. However, not all such duties are fiduciary duties. In the case of the duty of care, it is a common law duty and an equitable duty: See ROBERT AUSTIN & IAN RAMSAY, *FORD, AUSTIN & RAMSAY'S PRINCIPLES OF CORPORATIONS LAW* paras. 8.010.3, 8.320 (2019) (explaining the position in Australia). A similar position applies in other common law countries, which generally treat loyalty as the only "fiduciary duty." See Christopher M. Bruner, *Is the Corporate Director's Duty of Care a "Fiduciary" Duty? Does It Matter?*, 48 WAKE FOREST L. REV. 1027, 1027–29 (2013) (noting that in the UK loyalty is the only fiduciary duty). In this Article, we have used the term "fiduciary duties" simply for convenience in discussing relevant duties under Australian law.

⁹⁴ Malcolm Anderson, Meredith Jones, Shelley Marshall, Richard Mitchell & Ian Ramsay, *Shareholder Primacy and Directors' Duties: An Australian Perspective*, 8 J. CORP. L. STUD. 161, 162 (2008); Richard Mitchell, Anthony O'Donnell, Ian Ramsay & Michelle Welsh, *Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution*, 38 MELBOURNE U.L. REV. 68, 94–95 n.134 (2014).

corporate law tools to shape corporate behavior on climate change in Australia, as well stakeholders' perception of the effectiveness of such efforts, offer lessons for evolving practice in the United States, and vice versa.

As we describe further in Parts II and III below, legal requirements regarding disclosure and shareholder proposals are generally more favorable to addressing climate change issues in the United States than in Australia, although greater access for investors to companies through informal engagement avenues may obviate the need for the more confrontational approach seen in the United States. Large institutional investors, such as sovereign wealth funds and pension funds (including Australia's substantial "superannuation" funds), have made significant investments in the top-200 Australian listed companies (ASX200),⁹⁵ with their concentrated shareholding giving them significant sway with companies.⁹⁶ In the context of fiduciary duties, the legal positions of the United States and Australia are reversed, with broader interpretations of relevant duties in Australia potentially easing the pathway for potential litigation there.⁹⁷ In addition, while the volume of shareholder proposals in Australia is dwarfed by that in the United States, interesting approaches are emerging around non-binding advisory resolutions in more well-established investor-corporate engagement activities that particularly focus on questions such as corporate lobbying and membership of industry organizations with anti-climate regulatory positions.⁹⁸ As these practices continue to evolve, they could offer examples of approaches that might also be pursued in U.S. shareholder activism.

This multi-pronged, comparative approach is not a panacea. No one has yet found a politically realistic way to address climate change at the pace that is needed to prevent major impacts, and corporate and financial law cannot address this problem without other significant environmental and energy law initiatives. Nonetheless, the Parts that follow provide an in-depth assessment, grounded in original interview-based research, of current views on the impact of these efforts to date, which provides a basis for assessing how to make future strategies more effective.

II. DISCLOSURE

The following three Parts provide our review of current developments in disclosure, shareholder proposals and engagement, and fiduciary duty based on our interview findings in a comparative U.S.-Australian context.

⁹⁵ JUSTIN ELLIS, UNDERSTANDING OWNERSHIP TRENDS IN AUSTRALIA: 2018 KEY INSIGHTS 6 (2018).

⁹⁶ PARLIAMENTARY JOINT COMM. ON CORPS. & FIN. SERVS., CORPORATE RESPONSIBILITY: MANAGING RISK AND CREATING VALUE 65 (2006).

⁹⁷ Barker, *supra* note 66, at 58–59.

⁹⁸ The Australasian Centre for Corporate Responsibility (ACCR) maintains details of resolutions. AUSTRALASIAN CTR. FOR CORP. RESP., <https://www.accr.org.au/> (last visited Mar. 25, 2021); *Australian ESG Shareholder Resolutions*, AUSTRALASIAN CTR. FOR CORP. RESP., <https://accr.org.au/shareholder-action/resolution-voting-history/> (last visited Sept. 19, 2020).

Each Part examines current developments and then discusses existing practices, drawing on qualitative interviews conducted with several dozen stakeholders in the United States and Australia.⁹⁹ Interviewees included mostly persons who work for corporations and investors, although they also included regulators, advocacy groups, and service providers. In the United States, interview participants encompassed the following groups:

- Listed companies (five interviews), drawn from the industry sectors of utilities, financial, food, retail, and materials. Interviews were undertaken with a corporate director, an in-house counsel with a securities law focus, and sustainability staff.
- Asset owners (three interviews), including a public employee pension fund, a union pension fund, and a charitable foundation.
- Asset managers (four interviews), including two investment funds with a focus on socially responsible investing and two with a focus on index funds.
- Investor and company service providers (two interviews).
- Investor associations (one interview).

In Australia, interviews covered similar groups, including:

- Corporate and financial sector regulators (two interviews).
- Civil society advocacy groups engaging with corporate law tools to influence company decisionmaking on energy transition (two interviews).
- Investor groups or associations (two interviews).
- Investor service providers providing ESG analysis, proxy voting, engagement and representation services (two interviews).
- Listed ASX50 companies (seven interviews), drawn from the industry sectors of energy, utilities and materials. Interviews were undertaken with various company officers including company secretaries, investment relations, and sustainability staff.
- Asset owners, with predominantly industry superfunds (seven interviews). Interviews were conducted with in-house ESG and investment analysts.

⁹⁹ Interviews were conducted in the United States with a total of fourteen persons from August to November of 2018. Interviews were conducted in Australia with a total of twenty-four persons from February to August of 2018. All interviewees' identities will be kept anonymous, except for the relevant aspects of identity, listed above. Interviewees are identified numerically by country (e.g., US1, AUS1).

- Asset managers (two interviews), with fund managers associated with the asset owners interviewed for the research. Interviews were conducted with in-house ESG and investment analysts.¹⁰⁰

This Part focuses on disclosure, which is one of the main securities law tools being used to promote a faster energy transition. In a previous Article, we discussed several pathways by which disclosure could do so.¹⁰¹ Disclosure could provoke disinvestment from companies with higher GHG emissions profiles to those with lower ones by revealing risks of the former and opportunities of the latter. It could affect involvement in companies by consumers and employees. Disclosure could also promote shifting of resources within companies by affecting the focus of and information available to corporate decisionmakers.¹⁰²

U.S. companies whose shares trade publicly must engage in a variety of required periodic disclosure, such as annual reports on Form 10-K and quarterly reports on Form 10-Q.¹⁰³ There are no specific requirements concerning climate change-related disclosure, but a variety of required disclosures may be implicated where climate change threatens to have a material impact on the financial performance of a company. Companies may also choose to disclose beyond what the securities laws require in other documents, and now many do so for various sustainability matters. This first Section reviews developments in mandatory and voluntary disclosure surrounding climate change and presents results from our interviews concerning the effects of these developments.¹⁰⁴

¹⁰⁰ In this Article we include insights from the Australian interviews, mainly as a comparison to the U.S. findings. For a fuller analysis of the results of the Australian interviews, see generally Jacqueline Peel, Anita Foerster, Brett McDonnell & Hari M. Osofsky, *Governing the Energy Transition: The Role of Corporate Law Tools*, 36(5) ENV'T & PLAN. L.J. 459 (2019) and the authors report on this research project: Jacqueline Peel, Hari Osofsky, Brett McDonnell, Anita Foerster & Rebekkah Markey-Towler, *Corporate Energy Transition: Legal Tools for Shifting Companies Towards Clean Energy Practices* (2020), available at https://law.unimelb.edu.au/_data/assets/pdf_file/0018/3500460/Corporate-Energy-Transition-Report.pdf (accessed April 13, 2021).

¹⁰¹ See generally Osofsky et al., *Energy Re-Investment*, *supra* note 4.

¹⁰² *Id.* at 649–52.

¹⁰³ Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq); 17 C.F.R. § 229.601 (2020).

¹⁰⁴ In addition to the effects discussed below, one way that climate activists can use disclosure is through enforcement actions. Most prominently, various state attorneys general have investigated the reporting practices of ExxonMobil, and, in 2016, a shareholder class action was brought against that company. Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html>; Ivan Penn, *California to Investigate Whether Exxon Mobil Lied About Climate-Change Risks*, L.A. TIMES (Jan. 20, 2016, 3:00 AM), <http://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html>; SETZER & BYRNES, *supra* note 58, at 21.

A. *Legal and Institutional Developments*

In 2010, the SEC issued guidance on applying various reporting requirements to risks connected to climate change.¹⁰⁵ It included examples covering both risks that the effects of climate change may have on company assets and operations (so-called physical risks), and legal, market, and reputational risks associated with how a company responds, or fails to respond, to emerging rules and best practices that attempt to reduce GHG emissions (so-called non-physical or transition risks).¹⁰⁶

Early analysis of mandated reports following the 2010 SEC guidance suggested that disclosure concerning climate change did increase, but the disclosure by many companies remained brief and lacking in substance.¹⁰⁷ A more recent analysis found that in 2018, about 40% of S&P 500 companies addressed sustainability in their annual reports or 10-Ks.¹⁰⁸ Thirty-eight percent discussed sustainability issues in their annual proxy statements, typically in a summary at the beginning of the filing.¹⁰⁹

Companies may also choose to report matters beyond what the securities laws require. The demand from both shareholders and other stakeholders for information related to climate change and other sorts of sustainability concerns, combined with the lack of detailed rules from the SEC, has led to a growth of efforts to create voluntary disclosure standards. There are a variety of organizations competing to provide frameworks for disclosure concerning climate change. The Carbon Disclosure Project (CDP) focuses specifically on greenhouse gas emissions,¹¹⁰ and the TCFD also focuses on climate change issues.¹¹¹ In contrast, the Global Reporting Initiative (GRI),¹¹² Sustainability Accounting Standards Board (SASB),¹¹³ and International Integrated Reporting Council (IIRC)¹¹⁴ cover a wide range of sustainability topics. Some frameworks, like the TCFD, follow a standards-based approach while others, like the CDP and SASB, include more specific rules. In addition to organizations like these, which publish publicly available frameworks that companies may use in their reporting, other organizations gather information privately and use that information to issue ratings concerning performance along a variety of metrics, including metrics related to the environment and climate change. Leading examples

¹⁰⁵ Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, 241).

¹⁰⁶ *Id.*

¹⁰⁷ COBURN & COOK, *supra* note 5, at 11–12.

¹⁰⁸ KWON, STATE OF SUSTAINABILITY, *supra* note 5, at 33.

¹⁰⁹ *Id.*

¹¹⁰ CARBON DISCLOSURE PROJECT, <https://www.cdp.net/en> (last visited Mar. 27, 2021).

¹¹¹ TCFD, FINAL REPORT, *supra* note 7, at i.

¹¹² GLOB. REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES (2013), <https://commdev.org/pdf/publications/Global-Reporting-Initiative-G4-Sustainability-Reporting-Guidelines.pdf>.

¹¹³ SUSTAINABILITY ACCT. STANDARDS BD., SASB CONCEPTUAL FRAMEWORK 1 (2017).

¹¹⁴ INT'L INTEGRATED REPORTING COUNCIL, THE INTERNATIONAL <IR> FRAMEWORK 2 (2013).

include MSCI¹¹⁵ and Sustainalytics.¹¹⁶ In the United States, none of these competing approaches have yet achieved clear market dominance.¹¹⁷

Voluntary reporting of regular sustainability reports is much more widespread and extensive. A study of reporting in 2018 found that 92% of S&P 500 countries offered sustainability information on their websites.¹¹⁸ About 78% of these companies issued sustainability reports.¹¹⁹ Ninety-five percent offered environmental performance metrics, and 67% set quantified environmental goals.¹²⁰ Only a minority of the reports, 38%, obtained any external assurance concerning their reports.¹²¹

The literature on disclosure under securities law in general, and specifically on disclosure related to environmental issues, has identified various benefits and costs of such disclosure. Disclosure helps both investors and other stakeholders, such as customers and employees, decide whether or not to associate with the disclosing company.¹²² Disclosure can reduce informational asymmetries between the company and various stakeholders, reducing moral hazard and adverse selection issues.¹²³ The process of gathering and evaluating information to be disclosed can also change and improve internal decisionmaking.¹²⁴ However, there are direct monetary costs involved in gathering information. The process of gathering information will also divert the time and attention of directors, officers, and employees. Another concern is information overload.¹²⁵

Given the availability of voluntary disclosure, are there market imperfections that justify making some disclosure required?¹²⁶ Mandatory rules can standardize disclosure, making comparison across firms easier for investors and others.¹²⁷ Required sustainability disclosure could also encourage the reduction of externalities in company behavior (e.g., emission

¹¹⁵ *Our Purpose*, MSCI, <https://www.msci.com/our-purpose> (last visited Mar. 27, 2021).

¹¹⁶ *About Us*, SUSTAINALYTICS, <https://www.sustainalytics.com/about-us/> (last visited Mar. 27, 2021).

¹¹⁷ KWON, STATE OF SUSTAINABILITY, *supra* note 5, at 16–24; PUBLIC COMPANIES REPORT, *supra* note 5, at 41.

¹¹⁸ KWON, STATE OF SUSTAINABILITY, *supra* note 5, at 27.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 29.

¹²¹ *Id.*

¹²² *See supra* note 101–02 and accompanying text.

¹²³ Lipton, *supra* note 21, at 508–09; Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1209–11 (1999); Christensen et al., *supra* note 29, at 15.

¹²⁴ Lipton, *supra* note 21, at 509; Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047 (2019).

¹²⁵ Virginia Harper Ho, *Disclosure Overload? Lessons for Risk Disclosure & ESG Reporting Reform from the Regulation S-K Concept Release*, 65 VILL. L. REV. 67, 70 (2020).

¹²⁶ Christensen et al., *supra* note 29, at 18; Benjamin E. Hermalin & Michael S. Weisbach, *Information Disclosure and Corporate Governance*, 67 J. FIN. 195, 195 (2012); Christian Leuz & Peter Wysocki, *Economic Consequences of Financial Reporting and Disclosure Regulation: A Review and Suggestions for Future Research*, 54 J. ACCT. RES. 525 (2016).

¹²⁷ Christensen et al., *supra* note 29, at 18; PUBLIC COMPANIES REPORT, *supra* note 5, at 5.

of GHGs).¹²⁸ However, beyond the obvious direct costs of gathering and disclosing information, if the disclosure rules are not well designed, they may focus companies on low-value matters.¹²⁹ Voluntary approaches may also provide more flexibility for companies to disclose only information that is relevant to their businesses, thereby reducing costs.¹³⁰ The limited evidence on mandatory sustainability disclosure suggests that reporting regulation may increase costs, but it also may reduce harmful activities targeted by the regulation.¹³¹

Some jurisdictions have recently adopted rules requiring disclosure of various sustainability matters, including climate change.¹³² In 2016, France implemented a significant law requiring disclosure specifically focused on climate change.¹³³ The law requires listed companies to disclose financial risks related to climate change, the measures adopted to reduce them, and the consequences of climate change for their activities.¹³⁴ The European Union is in the process of enacting rules concerning disclosure of sustainability risks.¹³⁵

As part of a broad release seeking public comment on a wide range of disclosure issues, the SEC, in 2016, sought guidance on the need for more detailed rules on ESG issues, including climate change.¹³⁶ So far, the SEC has not proposed any new rules.¹³⁷ The Concept Release received a large number of comments.¹³⁸ Of those who commented, investors mostly supported more extensive and rule-like disclosure rules, while companies opposed such changes.¹³⁹ In February of 2021, the acting chair of the SEC issued a public statement directing the Division of Corporate Finance “to enhance its focus on climate-related disclosure in public company filings.”¹⁴⁰ A month later she issued a request for public comments on such

¹²⁸ Christensen et al., *supra* note 29, at 19.

¹²⁹ *Id.* at 20.

¹³⁰ PUBLIC COMPANIES REPORT, *supra* note 5, at 38.

¹³¹ *Id.* at 38–39.

¹³² FRENCH ENERGY TRANSITION LAW, *supra* note 83, at 4.

¹³³ *Id.* at 6.

¹³⁴ *Id.* at 7.

¹³⁵ Paul Davies & Michael D. Green, *EU Issues New Sustainable Investment Disclosure Rules*, LEXOLOGY (Apr. 5, 2019), <https://www.lexology.com/library/detail.aspx?g=61d5698f-bf73-451c-9c49-bdc6b342442b>.

¹³⁶ Business and Financial Disclosure Required by Regulation S–K, 81 Fed. Reg. 23,916 (Apr. 22, 2016) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 240, 249).

¹³⁷ See Jennifer Burns, Christine Robinson & Kristen Sullivan, *The Atmosphere for Climate-Change Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2020), <https://corpgov.law.harvard.edu/2020/04/05/the-atmosphere-for-climate-change-disclosure/> (explaining the SEC’s 2010 guidance remains relevant).

¹³⁸ Ho, *supra* note 125, at 91.

¹³⁹ *Id.* at 92.

¹⁴⁰ Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure*, SEC (Feb. 24, 2021), <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure>.

disclosure.¹⁴¹ The SEC's Division of Enforcement has created a Climate and ESG Task Force, which will focus on gaps in issuer disclosure.¹⁴² Climate-related disclosure is thus clearly high on the agenda of the SEC under the Biden administration.

As we have seen, one way that disclosure may promote energy transition is by causing shareholders and other stakeholders to reassess whom they choose to patronize.¹⁴³ Reflecting the shareholder primacy approach discussed in Part I,¹⁴⁴ the dominant though disputable¹⁴⁵ view is that federal securities law mandates disclosure solely for the benefit of investors and that the disclosure should focus on the financial risks associated with an investment. Disclosure around sustainability issues such as climate change is then justified to the extent that such matters may have a material effect on financial returns.¹⁴⁶ That is clearly the position the SEC took in its 2010 guidance on climate change-related disclosure.¹⁴⁷

Whether or not current securities law is understood as legally focused only on investors, it is not just investors who use that disclosure—investors, employees, and other stakeholders also use it. Information that may not be material to financial results may be material to the interests of other stakeholders. Regulation that focuses only on financial risks and returns will not force companies to reveal all of the information that matters to other stakeholders.¹⁴⁸

The literature reveals much concern about the quality of current disclosure. The lack of mandatory rules allows companies to selectively pick and choose what they want to disclose, emphasizing positive developments and making it hard to compare developments across companies.¹⁴⁹ The IIRC Institute's survey of S&P 500 company reporting found that most companies pick and choose among various frameworks, customizing a unique style.¹⁵⁰ Only a minority obtain any external assurance.¹⁵¹

Investors are also unhappy with current disclosure. A recent survey of institutional investors found that many believe that current "disclosures are imprecise and not sufficiently informative."¹⁵² They also believe that there

¹⁴¹ Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosure*, SEC (Mar. 15, 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

¹⁴² Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), <https://www.sec.gov/news/press-release/2021-42>.

¹⁴³ *Supra* note 101–02 and accompanying text.

¹⁴⁴ *Supra* notes 30–35 and accompanying text.

¹⁴⁵ Sale, *supra* note 124.

¹⁴⁶ Fisch, *supra* note 21, 932–33.

¹⁴⁷ See Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295–97 (Feb. 8, 2010) (codified at 17 C.F.R. pts. 211, 231, 241).

¹⁴⁸ Lipton, *Not Everything Is About Investors*, *supra* note 21; Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RES. L. REV. 863, 866–67 (2019).

¹⁴⁹ Fisch, *supra* note 21, at 947.

¹⁵⁰ KWON, STATE OF SUSTAINABILITY, *supra* note 5, at 31.

¹⁵¹ *Id.* at 29.

¹⁵² Emirhan Ilhan, Philipp Krueger, Zacharias Sautner & Laura T. Starks, *Climate Risk Disclosure and Institutional Investors* 17 (Eur. Corp. Governance Inst., Working Paper No. 661/2020, 2020).

should be more standardization.¹⁵³ Another recent survey similarly reported inconsistencies in quantitative disclosures between companies, which limits comparability (for example, differing approaches to reporting CO₂ emissions), as well as gaps in narrative disclosures, which undermines investors' ability to understand companies' strategies for managing risks and opportunities.¹⁵⁴ An analysis of public comment letters to the SEC's 2016 questions on the current state of disclosure showed that most responding investors said that current disclosure leads to too little disclosure and too much boilerplate.¹⁵⁵ The lack of standardization is thus a serious concern. This is a widely-recognized justification for mandatory disclosure regulation in the general literature on securities law.¹⁵⁶ But private coordination may be able to set effective standards without the need for governmental regulation, and private standard-setting may be more likely to agree upon efficient standards than government agencies.¹⁵⁷ Perhaps, for instance, the recent announcement by BlackRock's CEO¹⁵⁸ that they are pushing their portfolio companies to use SASB and TCFD will help focus disclosure on those two standards. More recently, many of the leading organizations promoting voluntary climate-related and ESG disclosure have made efforts to increase coordination among private standards. In September of 2020, five organizations—CDP, SASB, GRI, the Climate Disclosure Standards Board, and Integrated Reporting—released a paper detailing how they intend to work together to help create a more standardized reporting system.¹⁵⁹

B. *U.S. Interview Findings*

Our U.S. interview participants were employed by a variety of types of entities, including operating companies, investors, asset managers, law firms, and advocacy organizations.¹⁶⁰ We asked them several open-ended questions concerning disclosure related to climate change. These included whether there is agreement on the importance of climate change disclosure and what it should look like; how disclosure affects investment and engagement decisions by investors and asset managers; how disclosure practices could be improved; and whether and how disclosure affects risk management and operating decisions by the disclosing companies. We describe here some of the patterns that emerged in the participants' answers that help

¹⁵³ *Id.* at 18.

¹⁵⁴ PUBLIC COMPANIES REPORT, *supra* note 5, at 12.

¹⁵⁵ Ho, *supra* note 125, at 111.

¹⁵⁶ EASTERBROOK & FISCHER, *supra* note 33, at 303–04.

¹⁵⁷ Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 517–18 (1998).

¹⁵⁸ Fink, *supra* note 37.

¹⁵⁹ IMPACT MGMT. PROJECT, WORLD ECON. F. & DELOITTE, STATEMENT OF INTENT TO WORK TOGETHER TOWARDS COMPREHENSIVE CORPORATE REPORTING (2020).

¹⁶⁰ See *supra* notes 99–100 and accompanying text.

elaborate what is happening in practice with disclosure, and the extent to which it is (or is not) shaping corporate behavior regarding climate change.

Participants confirmed that there has been a major increase in climate change disclosure in recent years. However, their overall view was that the quality of this disclosure is mixed. While larger companies and those in industries more exposed to climate change risks are more likely to make detailed and helpful disclosures, many companies cherry-pick positive information or make vague or boilerplate statements.

One participant, who advises companies on disclosure and engagement, commented, “It’s gone from nothing to a policy-and-platitudes type of disclosure.”¹⁶¹ Another, who works as a securities lawyer at a law firm, responded that “most companies do nothing,”¹⁶² but noted that, for those who do report, disclosure can vary from “lofty goals and statements as opposed to some others that really give graphs, give data, give hard information.”¹⁶³ An employee of an investment firm with a focus on responsible investment noted that disclosure is “a relatively new area” for small and mid-cap companies, with “a huge amount of work to be done” to effect improvements.¹⁶⁴ This participant thought that overall “we’re on the right path,”¹⁶⁵ whereas others voiced a need for more standardization to improve quality: “[T]he next step is to put more data around it, and more meat on the bones so that the people who consume this information can see exactly what you’re talking about, what the risks are.”¹⁶⁶

A factor underlying the current variability in disclosure practice appears to be proliferating available models, with participants noting the presence of competing standards. One participant, who is an employee at an asset management company, commented on the lack of consensus, noting, “It’s actually worse than that. Everybody wants to set the standard. The proliferation of sustainability codes is getting to be absurd.”¹⁶⁷ This position was reflected in the interview results as a whole, with some participants seeing no particular standard currently emerging as the leading one. Others did point to one or two standards as the current or emerging leader, but identified different standards in this regard, with CDP, TCFD, GRI, and SASB all being mentioned. As one consultant participant described it:

There’s a bunch of people currently looking at MSCI, others looking at TCFD, others thinking about SRI, SASB. So, there’s all these different organizations out there. Different organizations that are in a lot of ways competing with each other for the

¹⁶¹ Interview with US9 (Oct. 30, 2018).

¹⁶² Interview with US12 (Dec. 6, 2018).

¹⁶³ *Id.*

¹⁶⁴ Interview with US8 (Oct. 15, 2018).

¹⁶⁵ *Id.*

¹⁶⁶ Interview with US9 (Oct. 30, 2018).

¹⁶⁷ Interview with US1 (Aug. 18, 2018).

attention of the various stakeholders, and it contributes to a lot of confusion, but at the same time is also demonstrating just how much energy and need there is in this space.¹⁶⁸

A frequent point made by participants was that the lack of common standards makes it harder to compare practice across companies, or even for the same company over time. A securities lawyer commented:

Right now there's no standards, so the ability to do comparability just doesn't exist, and when you look at data you just don't know if this is apples to apples to anything. Because there's no standards in the way we measured it this year, the same way we measured it last year, the way we'll measure it next year.¹⁶⁹

On the company side, as well as for investors, the proliferation of standards is a problem, as companies face pressures to respond to varying requests for information, and must decide which, if any, standards to follow. Although companies generally opposed new SEC disclosure rules for sustainability matters in comments to the 2016 release,¹⁷⁰ the growth of standards since then may give more reason for companies to accept, or at least less strongly oppose, new rulemaking that would provide uniformity.¹⁷¹ As one of our company-side interviewees remarked, "I think clarity is a helpful thing, and so I think if the SEC were to come out with a required standard of disclosure it would be helpful, because it would simplify our work, and it would simplify the work for the investor."¹⁷²

Despite the variability and lack of comparability at present, practices in climate change disclosure are clearly evolving. In the last few years, it has gone from imprecise qualitative statements, to more precise and detailed quantitative metrics, to setting specific targets to be attained. A participant on the investor side commented particularly on the emergence of disclosure using targets. According to this participant, "the best companies know why or why they cannot hit a target," with sometimes the most useful disclosures being about "why you can't hit a target."¹⁷³

As noted above, many argue that customers, employees, and other stakeholders are major intended audiences of sustainability disclosure, not just investors.¹⁷⁴ Several of our interviewees made the same point, noting diverse disclosure drivers such as "brand enhancement,"¹⁷⁵ particularly with millennial customers who may have a deep concern about climate issues.¹⁷⁶

¹⁶⁸ Interview with US9 (Oct. 30, 2018).

¹⁶⁹ Interview with US12 (Dec. 6, 2018).

¹⁷⁰ *Supra* note 139 and accompanying text.

¹⁷¹ *Ho, supra* note 125.

¹⁷² Interview with US5 (Sept. 27, 2018).

¹⁷³ Interview with US6 (Oct. 5, 2018).

¹⁷⁴ *Supra* notes 145–148 and accompanying text.

¹⁷⁵ Interview with US11 (Nov. 15, 2018).

¹⁷⁶ Interview with US12 (Dec. 6, 2018).

Indeed, where disclosure has a real effect on company behavior, it may be more because of concern about the company's reputation with other stakeholders than with shareholders. One participant, a securities lawyer, related an anecdote about a board receiving a shareholder proposal, which the board was initially reluctant to engage with, "but when they changed the narrative a little bit and thought about the value of the responsibility report and some more reporting on environmental as a way to attract millennials who are a target of their employment efforts, then they became more receptive to it."¹⁷⁷

In the past, climate-related disclosures have often been made in separate voluntary sustainability reports rather than in mandated securities disclosures. Several interviewees noted, however, a significant benefit of including such disclosure within financial disclosure documents mandated under securities law: information gathered for securities law disclosure gets more attention within a corporation due to liability concerns.¹⁷⁸ As one pension fund employee participant remarked, "I think the implications will force management and the board to engage in a more meaningful way."¹⁷⁹ Indeed, the threat of liability has induced public companies to build in extensive systems for collecting and verifying such information. There is both an internal audit system and external auditors. Top executive officers review the process and resulting information, and the board is involved below.¹⁸⁰

By contrast, a weakness of the voluntary disclosure of sustainability information is that the collection and processing of such information may be done within a sustainability office that is isolated from other operating divisions. As a consequence, these reports, "even though they get some level of review, they clearly don't get the level of review and scrutiny as if you're actually going to take the extra step of putting it in your proxy."¹⁸¹ According to a sustainability officer participant, "the best thing that could happen with disclosure is integrated reporting, meaning not having a separate sustainability report with the GRI index and an annual report."¹⁸² This would help make such reporting standardized, central to corporate operations, and a requirement rather than a voluntary option.¹⁸³ However, this was not a universal view. A lawyer within an operating company noted one of the counter-arguments in favor of separate sustainability reports as being the likelihood of more information being disclosed. This participant commented:

While I understand the movement to include things in all filings so it's together, I think the focus of CR reports, if done

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 104 and accompanying text.

¹⁷⁹ Interview with US10 (Nov. 9, 2018).

¹⁸⁰ For some further discussion of the risk management process, see *infra* Section II.C.

¹⁸¹ Interview with US12 (Dec. 6, 2018).

¹⁸² Interview with US11 (Nov. 15, 2018).

¹⁸³ *Id.*

well, probably give you more and better information than if you were to try and fold it into a filed document where it's one of a number of issues. This topic in particular is an area where people want more details. Probably more details than would be considered material.¹⁸⁴

The ultimate question about the new climate change disclosure practice is whether it is causing companies to respond to climate change risks and opportunities more quickly. In a context where climate change disclosure only started in earnest recently and is very rapidly evolving, the interview evidence shows that many factors are working to both encourage and block company change. Reflecting this, interviewees expressed different opinions about the effect of disclosure on company behavior.

No interviewee on the company side pointed to any clear way in which disclosure was causing their company to behave differently in a substantive way. The exception was the corporate sustainability officer, noted above, who spoke of several instances where concern about customer reaction caused the company to pay attention to a few matters.¹⁸⁵ Most interviewees on the company side seemed to think their companies were already heavily engaged with climate change questions and the pressure for disclosure was simply pushing them to better communicate what they were already doing. Another sustainability officer more forcefully denied that shareholder proposals encouraging more disclosure would change corporate behavior, characterizing this as “a mistaken theory of change.”¹⁸⁶

Some on the investor side had more hope that disclosure would eventually change behavior, particularly as disclosure evolves to include more detailed metrics and targets. A pension fund employee opined: “If SASB were ever to realize its true objective of getting into the financial statement, it may not provide as good information to investors, but it will be more likely to change company behavior because it's the kind of disclosure that ultimately has to go to the boardroom.”¹⁸⁷ The same person continued: “There is no question that there is an uptake in engagement and more companies understand the need to engage and even now at the board level. I think there is an emphasis in trying to appear responsive to investors.” A former pension fund employee expressed more impatience with relying on existing disclosure rules, stating, “the regulatory system has a much larger role to play, and our legal system, and frankly our governmental agencies.”¹⁸⁸ Overall, then, it appears based on the interviewees' insights that increasing disclosure has not yet changed company behavior

¹⁸⁴ Interview with US4 (Sept. 20, 2018).

¹⁸⁵ See *supra* note 175 and accompanying text.

¹⁸⁶ Interview with US5 (Sept. 27, 2018).

¹⁸⁷ Interview with US10 (Nov. 9, 2018).

¹⁸⁸ Interview with US13 (Dec. 12, 2018).

significantly in the United States, but has potential to do so if pursued in a more standardized and rigorous way.

C. *Australian Interview Findings*

In Australia, our interview participants came from a range of different entities, including ASX50 listed companies, investor groups, asset managers, regulators, superannuation funds, and civil society advocacy organizations.¹⁸⁹ As with our U.S. participants, we asked them a similar set of open-ended questions concerning Australian business practices on disclosure related to climate change. We first describe here the relevant corporate legal requirements pertaining to disclosure by Australian companies, before comparing the patterns that emerged in the participants' answers to those of our U.S. participants.

As in the United States, federal corporations law in Australia does not mandate specific climate-related disclosures, nor any form of sustainability reporting. Instead, companies listed on the ASX must provide financial statements which present a "true and fair view" of the company's financial position and performance, as well as disclose risks that are financially material for their businesses in a Director's Report.¹⁹⁰ Although Australian company and securities regulators have not introduced an equivalent to the SEC's 2010 guidance,¹⁹¹ various recent regulatory guides and statements indicate a growing expectation of disclosure of climate (and other ESG) risks where those risks are judged to be financially material for ASX-listed companies.¹⁹² Influential opinions issued by leading corporate lawyers have

¹⁸⁹ *Supra* notes 99–100 and accompanying text.

¹⁹⁰ *Corporations Act 2001* (Cth) ss 297, 299(1)(d).

¹⁹¹ A Senate Inquiry of the Federal Government recommended that Australian company and securities regulators review and/or provide guidance on the implications of carbon risk but no legislation was introduced mandating regulators to take such steps: COMMONWEALTH OF AUSTR., ECON. REFERENCES COMM., CARBON RISK: A BURNING ISSUE (2017).

¹⁹² See AUSTRAL. SEC. & INVS. COMM'N, REGULATORY GUIDE 247: EFFECTIVE DISCLOSURE IN AN OPERATING AND FINANCIAL REVIEW 19–20 (2019) ("An OFR should include a discussion of environmental, social and governance risks where those risks could affect the entity's achievement of its financial performance or outcomes disclosed, taking into account the nature and business of the entity and its business strategy," including climate change risks); ASIC, REGULATORY GUIDE 228: PROSPECTUSES: EFFECTIVE DISCLOSURE FOR RETAIL INVESTORS (2019) (directing issuers and their advisors that climate change impacts may need to be disclosed in prospectuses for retail investors); ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 27 (4th ed., 2019) ("A listed entity should disclose whether it has any material exposure to environmental or social risks and, if it does, how it manages or intends to manage those risks", including climate change risks); AUSTRAL. ACCT. STANDARDS BD. & AUSTRAL. AUDITING & ASSURANCE STANDARDS BD., CLIMATE-RELATED AND OTHER EMERGING RISKS DISCLOSURES: ASSESSING FINANCIAL STATEMENT MATERIALITY USING AASB/IASB PRACTICE STATEMENT 2 (2019) (instructing directors, preparers, and auditors to use and consider AAS Practice Statement 2 which includes climate risks in financial statements); Geoff Summerhayes, *Letter to All APRA-Regulated Entities: Understanding and Managing the Financial Risks of Climate Change* (Feb. 24, 2020), <https://www.apra.gov.au/understanding-and-managing-financial-risks-of-climate-change> (outlining plans to develop climate change financial risk guidance, and conducting a "climate change financial vulnerability assessment," starting with the banks)

also highlighted the liability exposure of companies that fail to disclose financially material climate business risks.¹⁹³ This legal theory was tested in the case of *Abrahams v. Commonwealth Bank of Australia*, involving a shareholder claim against one of the country's largest banks, alleging a failure to disclose climate risks in its 2016 Annual Report.¹⁹⁴ The proceedings were withdrawn, but only following the bank's commitment to improve disclosure practices, with noticeable improvements in subsequent annual reports.¹⁹⁵

A key difference between Australian and U.S. climate risk disclosure practice is developing consensus in Australia around the framework that should guide any such climate-related financial disclosures, with the TCFD emerging as the supported standard in this regard and many leading companies formally adopting this approach.¹⁹⁶ The TCFD has been favorably referenced as a climate risk disclosure framework by the Australian corporate regulator, ASIC.¹⁹⁷ It also appears that institutional investors in Australia have played a key role in raising the profile of the TCFD by using this framework in their engagement strategies with companies. For example, the Australian Council of Superannuation Investors (ACSI), whose members manage AUD \$2.2 trillion in assets, has described the TCFD recommendations as the emerging "gold standard" for climate risk reporting by Australian listed companies.¹⁹⁸ The TCFD's 2019 status report indicates that, globally, 785 companies and other organizations have committed to support the TCFD.¹⁹⁹ This growing global acceptance, alongside default adoption of the TCFD framework in countries such as Australia, may be influential for U.S. practice as different disclosure standards compete there for prominence.

¹⁹³ HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25, at para. 1.

¹⁹⁴ Concise Statement, *Abrahams v Commonwealth Bank of Austl.* [2017] FCA VID 879/2017.

¹⁹⁵ See subsequent annual reports for Commonwealth Bank of Australia: COMMONWEALTH BANK OF AUSTR., ANNUAL REPORT 2017 (2017), https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/annual-reports/annual_report_2017_14_aug_2017.pdf; COMMONWEALTH BANK OF AUSTR., ANNUAL REPORT 2018: BECOMING A SIMPLER, BETTER BANK (2018), <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/results/fy18/cba-annual-report-2018.pdf>; COMMONWEALTH BANK OF AUSTR., 2019 ANNUAL REPORT (2019), <https://www.commbank.com.au/content/dam/commbank-assets/about-us/2019-09/cba-annual-report-2019-spreads.pdf>.

¹⁹⁶ TCFD, *supra* note 7, at 5.

¹⁹⁷ John Price, Comm'r, Australian Sec. & Invs. Comm'n, Keynote Address at the Centre for Policy Development: Financing a Sustainable Economy (June 18, 2018); Press Release, Australian Sec. & Invs. Comm'n, 19-208MR ASIC Updates Guidance on Climate Change Related Disclosure (Aug. 12, 2019), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-208mr-asic-updates-guidance-on-climate-change-related-disclosure/>. It has also been referenced by the ASX and APRA. See *supra* note 192.

¹⁹⁸ AUSTR. COUNCIL OF SUPERANNUATION INVS., CORPORATE SUSTAINABILITY REPORTING IN AUSTRALIA 7 (2018). The ACSI also refers to an expectation in their governance guidelines that companies with material exposure to climate-related risks make disclosures in line with the TCFD. AUSTR. COUNCIL OF SUPERANNUATION INVS., ACSI GOVERNANCE GUIDELINES: A GUIDE TO INVESTOR EXPECTATIONS OF LISTED AUSTRALIAN COMPANIES 29 (2019).

¹⁹⁹ TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, STATUS REPORT 110 (2019).

Our results from interviews with Australian participants showed a similar pattern to the United States of highly variable disclosure practice that is in a considerable state of flux. Overall, the investors interviewed described the disclosure practices of Australian companies as “totally inadequate,” “under-developed,” “reactive and piecemeal,” “non-strategic,” “pretty poor,” and “deeply deficient.” They expressed concerns that companies were focusing narrowly and not adequately addressing all forms of climate risk and that they were not integrating and quantifying risks into financial statements as recommended by the TCFD.²⁰⁰ However, they also noted that climate risk disclosure was in its infancy and evolving quickly; concerns about the quality and usefulness of climate disclosures have led to a debate like that in the United States over whether there is a need for more standardization and higher levels of regulation in this sphere.²⁰¹

While there is a strong momentum towards Australian companies and regulators embracing the TCFD framework as a basis for disclosures, it is not clear that these new disclosure expectations are driving companies to respond to climate change risks and opportunities more quickly or to transition to cleaner energy practices. Early experimentation with scenario analysis by companies (a key recommendation of the TCFD) shows a tendency for even highly exposed companies to portray their business-as-usual prospects favorably, despite the associated risks, often suggesting that near-to-medium term prospects are strong for highly climate-damaging products and operations (e.g., fossil fuel exploration and development).

In interviews, investors expressed some disappointment that such climate risk-exposed companies using Paris Agreement-compliant scenario analysis—an approach recommended by the TCFD²⁰²—were still reporting no negative impact of climate change on their businesses.²⁰³ Subsequent surveys of company reporting confirm these problems and suggest that there has been little improvement. For example, a Market Forces 2019 analysis of the public disclosures of seventy-two ASX100 companies operating in sectors facing the highest levels of climate risk found that climate risk disclosure across these companies remains “largely superficial.”²⁰⁴ For the

²⁰⁰ Interview with AUS3 (Jan. 13, 2018); Interview with AUS5 (Mar. 2, 2018); Interview with AUS6 (Mar. 22, 2018); Interview with AUS8 (Mar. 15, 2018).

²⁰¹ In this regard, interview participant 9 cautioned against too much standardization and the emergence of lowest common denominator metrics. Interview with AUS9 (June 18, 2018).

²⁰² On scenario analysis, see TCFD, *supra* note 7, at 25–30, and TCFD, TECHNICAL SUPPLEMENT: THE USE OF SCENARIO ANALYSIS IN DISCLOSURE OF CLIMATE-RELATED RISKS AND OPPORTUNITIES (JUNE 2017).

²⁰³ Interview with AUS4 (Mar. 7, 2018); Interview with AUS8 (Mar. 15, 2018); Interview with AUS22 (Apr. 22, 2018).

²⁰⁴ The Market Forces analysis highlighted that only 57% of the companies surveyed identified climate change as a material business risk; 32% detailed climate risks and opportunities in mainstream reporting; 14% disclosed detailed climate change scenario analysis; 24% disclosed an emissions reduction plan; and 22% have set an absolute emissions reduction target. MKT. FORCES, INVESTING IN THE DARK 2–3 (2019).

United States, this experience suggests that even if consensus can be reached around a particular voluntary disclosure standard over time, this still may not be enough to drive shifts in corporate behavior that support energy transition without greater standardization and specification regarding required disclosures.

III. SHAREHOLDER PROPOSALS AND ENGAGEMENT

Growing shareholder activism and engagement on climate change-related matters specifically, and on ESG issues more generally, has a public and a private face. The public face is shareholder proposals, in which shareholders use Rule 14a-8 to include mostly advisory proposals in a company's proxy and have their fellow shareholders vote on the proposal at the annual meeting.²⁰⁵ Shareholders need to follow only minimal procedural rules to have their proposals included, although companies may argue that the proposal should be excluded for one of thirteen specified reasons.²⁰⁶ The number of such proposals submitted in a year has increased substantially. The votes in favor of such proposals have also increased dramatically, from the single digits to an average in the range of 25%, with many proposals in the 30% or 40% range and some occasionally passing, most notably climate change proposals at ExxonMobil, Occidental Petroleum, and PPL.²⁰⁷ The private face of shareholder engagement is dialogue between individual or groups of shareholders and companies in meetings, phone calls, or emails. Private engagement with a focus on environmental or social issues has increased significantly in the past decade.²⁰⁸

As seen in our earlier analysis, shareholder engagement aims to encourage a faster transition through inducing companies to shift internal resources to cleaner energy uses.²⁰⁹ This Part explores developments in shareholder engagement and the impact that they are having on climate change action.

A. Legal and Institutional Developments

The growth in shareholder engagement has taken place during a transformation of the ownership of shares in U.S. public corporations. To understand that engagement, one needs to understand that context,

²⁰⁵ 17 C.F.R. § 240.14a-8 (2020).

²⁰⁶ 17 C.F.R. § 240.14a-8(i) (2020); Virginia Harper Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, & Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1246 (2019).

²⁰⁷ Posner, *supra* note 1.

²⁰⁸ Barko et al., *supra* note 28, at 2, 4; CERES, THE ROLE OF INVESTORS IN SUPPORTING BETTER CORPORATE ESG PERFORMANCE: INFLUENCE STRATEGIES FOR SUSTAINABLE AND LONG-TERM VALUE CREATION 23 (2019), <https://www.ceres.org/resources/reports/role-investors-supporting-better-corporate-esg-performance>; MAJORITY ACTION, CLIMATE IN THE BOARDROOM: HOW ASSET MANAGER VOTING SHAPED CORPORATE CLIMATE ACTION IN 2019, at 5, 16 (2019), <https://www.majorityaction.us/asset-manager-report>.

²⁰⁹ See *supra* note 101 and accompanying text.

particularly the nature of several major types of institutional investors. In 1945, over 90% of the shares of publicly-traded U.S. corporations were owned by individuals; now, about 80% of shares are owned by institutions rather than individuals.²¹⁰ This has the potential to transform corporate governance, overcoming the separation of ownership from control traditionally seen as the core governance issue.²¹¹ But whether or not it will depends on the behavior of institutional investors. After describing important types of shareowners, we discuss several important legal developments and then some empirical evidence on shareholder engagement.

Socially responsible investment funds are the most obvious candidate for investors that could engage with companies to focus on climate change and other sustainability matters. Such funds screen the companies in which they invest based on specific sustainability metrics. A quarter of all dollars under professional management are invested in such funds.²¹² But not all such funds support ESG proposals. For instance, sustainability funds sponsored by BlackRock, JP Morgan, and Vanguard have been criticized for not supporting ESG proposals.²¹³

Another type of investor that submits ESG proposals are some public employee and union pension funds.²¹⁴ Controversy surrounds pension fund activism. Critics see pension funds as serving special interests that conflict with the interests of other shareholders.²¹⁵ Others counter that successful pension fund activism focuses on items that advance the financial interests of

²¹⁰ Jan Fichtner, Eelke Heemskerk & Javier Garcia-Bernardo, *These Three Firms Own Corporate America*, CONVERSATION (May 10, 2017, 2:14 AM), <https://theconversation.com/these-three-firms-own-corporate-america-77072>.

²¹¹ ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 138–42 (1932).

²¹² Adam Connaker & Saadia Madsbjerg, *The State of Socially Responsible Investing*, HARV. BUS. REV. (Jan. 17, 2019), <https://hbr.org/2019/01/the-state-of-socially-responsible-investing>.

²¹³ Patrick Temple-West, *Big US Sustainable Funds Fail to Support ESG Shareholder Proposals*, FIN. TIMES (Sept. 7, 2019), <https://www.ft.com/content/5d342a5d-443d-3327-9502-2361f37f251c>.

²¹⁴ For an outstanding history and overview of pension fund activism, see generally DAVID WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* (2018); see also Stephen J. Choi & Jill E. Fisch, *On Beyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 316–20 (2008) (analyzing the various forms of activism that public pension funds engage in and the differences in activism between large and small pension funds); Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1023 (1998) (examining the shared interests between workers and shareholders).

²¹⁵ See, e.g., Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 795–96, 798 (1993) (“[M]anagers of corporate pension funds and financial institutions have other business relations with issuers that are thought to generate conflicts of interest preventing them from opposing corporate management.”); STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 228–32 (2008) (for example, union and public pension funds using their position to “self-deal” and with management potentially becoming less concerned with the welfare of other smaller investors).

shareholders, which can receive the support of other shareholders, and that pension funds decrease the collective action problem shareholders face.²¹⁶

A third important type of investor is big asset managers, including many index funds. Of these, the “Big Three” have become hugely important shareholders, with BlackRock and Vanguard each owning over 5% of the shares of most U.S. public corporations, and, often, Fidelity is also over that threshold.²¹⁷ These three companies thus have pivotal voting power for close proposals. Some critics²¹⁸ have argued that the big passive investors face incentives that discourage them from activism,²¹⁹ and significant evidence supports this view.²²⁰ Others dispute this criticism. Several argue that index fund managers do have incentives to engage in active stewardship.²²¹ Significant evidence supports this counterview as well.²²²

²¹⁶ See, e.g., Schwab & Thomas, *supra* note 214, at 1023 (explaining that union-shareholder activity can benefit other firm shareholders); Bebchuk et al., *supra* note 33, at 885 (“[U]nion pension funds may leverage their initiation power to extract concessions for labor.”).

²¹⁷ Fichtner et al., *supra* note 210.

²¹⁸ Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 494 (2018); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2033 (2019); see also Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 90 (2017) (“We identify several drivers of agency problems that afflict the decisions of investment managers of either passive index funds, active mutual funds, or both. First, such investment managers generally capture only a small fraction of the benefits that results from their stewardship activities while bearing the full cost of such activities. Further, competition with other investment managers is typically insufficient to eliminate these agency problems. Finally, investment managers may be further influenced by private incentives, such as their interest in obtaining business from corporations, that encourage them to side excessively with managers of corporations.”).

²¹⁹ These include a free rider problem, conflicting interest, and an emphasis on competing through low costs. See Lund, *supra* note 217, at 510–11 (noting a lack of financial incentive, acute collective action problem, and difficulty with government intervention); Bebchuk & Hirst, *supra* note 218, at 2046–75 (detailing investment managers’ incentives to underinvest in stewardship and be deferential to corporate managers).

²²⁰ The Big Three do not submit shareholder proposals, they do not privately engage with most of their portfolio companies, they vote mostly with management, and they are not plaintiffs in shareholder litigation. Bebchuk & Hirst, *supra* note 218, at 2066–2115.

²²¹ They have incentives to improve market returns, economies of scale in stewardship costs, a better chance of being pivotal voters, a longer time horizon, and reputational incentives to attract investors. See Jill E. Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors* 12–17 (Eur. Corp. Governance Inst., Working Paper 414/2018, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192069 (explaining that competition provides incentive for passive fund sponsors); Marcel Kahn & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders be Shareholders* 13–17, 28–42 (Eur. Corp. Governance Inst., Working Paper 467/2019, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295098 (explaining that shareholders of index funds can leave at any time and therefore there are incentives for passive investors); Michael Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1251 (2020) (detailing how index funds have demonstrated effective stewardship by activism in regard to ESG issues).

²²² The Big Three are increasing their stewardship teams, engaging in hundreds of private dialogues every year, and interacting with more activist investors by letting them initiate proposals then deciding how to vote. Fisch, *supra* note 221, at 49–51. An empirical study suggests index funds allocate resources to votes for which they are pivotal and that their ownership promotes value-creating proposals. Fatima-Zahra Filali Adib, *Passive Aggressive: How Index Funds Vote on Corporate Governance Proposals*, <https://ssrn.com/abstract=3480484>. Another empirical study finds that the Big Three focus their

Thus, some funds and individuals focused on socially responsible investing and some pension funds propose most climate change proposals, while the votes of the Big Three and a few others determine their success. How one evaluates both current and future shareholder engagement depends on how one evaluates the incentives and informational capacity of those investors.²²³

Several legal developments have affected the ability of investors to pursue ESG proposals. Many investors and asset managers are subject to strict fiduciary duty under the Employment Retirement Income Security Act of 1974 (ERISA), which provides that fiduciaries must act “for the exclusive purpose of [] providing benefits to participants and their beneficiaries”²²⁴ The Department of Labor interprets this language as requiring that fiduciaries may only consider financial returns and risks in making investment decisions.²²⁵ In a series of interpretive bulletins, the Department has seesawed in how much leeway fiduciaries have to frame sustainability factors as financial risks.²²⁶ More recently, the Department of Labor at the end of the Trump administration adopted rules that further limit the ability to consider ESG factors in selecting investments, although the Biden administration has announced that it is staying enforcement of this rule.²²⁷

The Department’s guidance has also addressed ESG activism in shareholder engagement by ERISA plans. Here too the guidance has seesawed. Under the Obama Administration, the Department was relatively encouraging of engagement. Under the Trump Administration, the

engagement on firms with high carbon emissions. Jose Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Climate Emission Around the World*, <https://papers.ssrn.com/abstract=3553258>. A different—and in some ways opposite—criticism is that the big investors are becoming too big and influential. John Coates argues that if current trends continue, a group of twelve or so individuals will have practical power over most U.S. public companies, creating serious legitimacy concerns. John C. Coates, *The Future of Corporate Governance Part I: The Problem of Twelve* (Harv. Pub. L. Working Paper, Paper No. 19-07, 2018), <https://ssrn.com/abstract=3247337>. A counterargument suggests that the Big Three may reduce significant social externalities, since they care about how policies adopted by any given company will affect the value of their whole portfolio, not just the adopting company. Condon, *supra* note 41, at 1.

²²³ A final type of institutional investor worth noting is activist hedge funds. These identify under-performing companies, buy a significant stake in them, and then propose value-enhancing strategies, threatening a proxy fight to replace incumbent directors should the board refuse. There is much controversy surrounding the social impact of activist funds. For a leading statement of the arguments in favor, see generally Bebchuk et al., *supra* note 36; for a leading statement of the arguments against, see generally Coffee & Palia, *supra* note 36. There is concern that activist funds increase shareholder value by diverting resources from other stakeholders. Thus, those who advocate policies promoting shareholder voice as a way to address climate change should worry that those same policies may enable activist hedge funds who could have an opposite effect.

²²⁴ 29 U.S.C. § 1104(a)(1)(A)(i) (2012).

²²⁵ Osofsky et al., *Energy Re-Investment*, *supra* note 4, at 618–19. It can be argued that this is an overly narrow interpretation of the exclusive purpose language, and that the interests of employees investing for their retirement should include their interests as employees as well. See Webber, *supra* note 214, at 181–211.

²²⁶ Osofsky et al., *Energy Re-Investment*, *supra* note 4, at 618–19.

²²⁷ “Financial Factors in Selecting Plan Investments,” 85 Fed. Reg. 72846 (November 13, 2020); *U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans* (March 10, 2021).

Department issued new guidance stating that typically fiduciaries should not engage in activities that “involve a significant expenditure of funds”²²⁸ If a fiduciary is considering engagement on environmental or social factors, that may well require “a documented analysis of the cost of the shareholder activity compared to the expected economic benefit”²²⁹ At the end of the administration, the Trump Department of Labor adopted a new rule further limiting ESG engagement by ERISA fiduciaries, although the Biden administration has stayed enforcement of this rule.²³⁰ The President also issued an Executive Order on promoting coal, oil, and natural gas which includes a provision directing the Department of Labor to review “existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets.”²³¹ Thus the Trump Administration acted to discourage ESG activism generally, and such activism focused on climate change specifically, but the Biden Administration is moving to reverse those measures.

The other significant legal development concerns limits on the ability of shareholders to use Rule 14a-8.²³² The SEC recently limited which shareholders can use Rule 14a-8. Previously, shareholders who had held at least \$2,000 in shares or 1% of the securities were entitled to vote for at least one year are eligible to use Rule 14a-8.²³³ Under the new rule, shareholders can only use the Rule if they have held \$2,000 in securities entitled to vote for at least three years, \$15,000 for at least two years, or \$25,000 for at least one year. These threshold levels mostly affect individual shareholders rather than institutional investors.²³⁴

²²⁸ Memorandum from John J. Canary, Dir. of Reguls. & Interpretations, Dep’t of Lab., to Mabel Capolongo, Dir. of Enf’t, Emp. Benefits Sec. Admin. 4 (Apr. 23, 2018), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01> [hereinafter Field Assistance Bulletin No. 2018–01].

²²⁹ *Id.* at 5. See Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020) (explaining that while ESG factors used by a trustee can violate the duty of loyalty, ESG investing may still be used if it will benefit the beneficiary directly and the trustee’s motivation is solely to obtain that direct benefit).

²³⁰ Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 C.F.R. 2509, 2550 (2020); EMP. BENEFITS SEC. ADMIN., U.S. DEP’T OF LAB., U.S. DEPARTMENT OF LABOR STATEMENT REGARDING ENFORCEMENT OF ITS FINAL RULES ON ESG INVESTMENTS AND PROXY VOTING BY EMPLOYEE BENEFIT PLANS (2021).

²³¹ Exec. Order No. 13868, *Promoting Energy Infrastructure and Economic Growth*, 84 Fed. Reg. 15,495, 15,497 (Apr. 10, 2019).

²³² *Supra* notes 205–07 and accompanying text.

²³³ 17 C.F.R. § 240.14a-8(b) (2020).

²³⁴ Secs. & Exch. Comm’n, Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8 Release No. 34-89964 (Sept. 23, 2020), <https://www.sec.gov/rules/proposed/2019/34-87458.pdf>. A resolution has been introduced in the Senate to use the Congressional Review Act to reverse this rule. A majority vote in the House and Senate is required to reverse the rule. Hazel Bradford, *Senate Moves to Undo SEC Shareholder Rights Rule Change*, Pensions & Investments, <https://www.pensionsinvestments.com/news/senate-moves-to-undo-sec-shareholder-rights-rule-change>.

Also notable is a shift in the SEC's interpretation of the ordinary business operations exclusion. Proposals that have met the procedural requirements of Rule 14a-8 may still be excluded if they fall within one of a number of exclusions given in the Rule.²³⁵ One of these bases for exclusion is "[i]f the proposal deals with a matter relating to the company's ordinary business operations."²³⁶ The SEC bases decisions on whether or not a proposal is excludable under the ordinary business basis on two considerations. The first is whether the matters "are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight."²³⁷ However, a proposal is not excludable under that consideration if it would "raise policy issues so significant that it would be appropriate for a shareholder vote."²³⁸ The significance of climate change protects most proposals on this point. The second consideration is whether a proposal "micro-manage[s]" the company.²³⁹ In several recent no-action letters, the SEC's staff has allowed the exclusion of proposals on this ground where the proposals encourage companies to impose GHG reduction targets.²⁴⁰ In a new Staff Legal Bulletin, the SEC explains that the key differentiator between excludable and non-excludable proposals is "the level of prescriptiveness" of the proposal.²⁴¹ Policy significance has not saved overly prescriptive proposals. In 2019, the SEC staff agreed with the issuers' requests to be allowed to exclude climate change proposals 45% of the time.²⁴² Here again there is some initial evidence that the SEC under the Biden Administration may change course from its predecessor. The acting chair in a speech noted she has asked the staff to revise guidance on the shareholder proposal process, and that this could involve reaffirming that proposals cannot be excluded if they concern socially significant issues, such

/www.pionline.com/regulation/senate-moves-undo-sec-shareholder-rights-rule-change (March 26, 2021). The Financial CHOICE Act, passed in the House, would have imposed stricter restrictions. Joseph A. Hall, *The Financial CHOICE Act and the Debate Over Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 28, 2017), <https://corpgov.law.harvard.edu/2017/06/28/the-financial-choice-act-and-the-debate-over-shareholder-proposals>.

²³⁵ 17 C.F.R. § 240.14a-8(i).

²³⁶ 17 C.F.R. § 240.14a-8(i)(7).

²³⁷ Secs. & Exch. Comm'n, Final Rule: Amendments to Rules on Shareholder Proposals, Release No. 34-40018 (1998).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See, e.g., Devon Energy Corp., SEC Staff No-Action Letter, 2019 WL 1058333 (Mar. 4, 2019) ("On March 4, 2019, we issued a no-action response expressing our informal view that the Company could exclude the Proposal from its proxy materials for its upcoming annual meeting on the basis that the Proposal would micromanage the Company by seeking to impose specific methods for implementing complex policies.").

²⁴¹ SEC Staff Legal Bulletin No. 14k (CF) (Oct. 16, 2019).

²⁴² MAJORITY ACTION, *supra* note 208, at 8.

as climate change, just because they may include components that could otherwise be viewed as “ordinary business.”²⁴³

Reflecting the growth of institutional investors, in the 2019 proxy season, environmental and social proposals submitted were down somewhat from the previous year but were still almost half of all proposals submitted (323 out of 678).²⁴⁴ Only a little under half (146) of those proposals went to a vote;²⁴⁵ proposals are withdrawn when proponents reach a compromise with the issuer. Average support for such proposals was 28%, as compared to 10% ten years earlier.²⁴⁶ Again, in 2020, the total number of environmental and social proposals submitted continued to decline (303) but the percentage voted on and number passed increased.²⁴⁷ Almost half went to vote in 2019 and 2020 (up from one-third in 2018) and a record fifteen proposals passed, despite a lower number of submissions overall.²⁴⁸ Average support was 27%.²⁴⁹ Informal engagement through dialogues with company employees, officers, and sometimes directors has also increased.²⁵⁰ A survey of 439 institutional investors found only 16% had not engaged in any way with companies on climate change.²⁵¹

There is limited evidence suggesting that ESG proposals can have some effect on corporate behavior. One study looks at 847 engagements on a range of ESG matters with 660 separate companies by a European investment management firm between 2005 and 2014.²⁵² About half of the engagements were aimed at improving disclosure, and half were aimed at company operations.²⁵³ The activist considered the engagement file successfully closed 60% of the time, with success defined as the target company complying with the shareholder’s request.²⁵⁴

²⁴³ Allison Herren Lee, *Speech by Allison Herren Lee on Meeting Investor Demand for Climate and ESG Information at the SEC*, <https://corpgov.law.harvard.edu/2021/03/16/speech-by-acting-chair-lee-on-meeting-investor-demand-for-climate-and-esg-information-at-the-sec/#20> (March 16, 2021).

²⁴⁴ Marc Treviño, *2019 Proxy Season Review: Part 1—Rule 14a-8 Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 26, 2019), <https://corpgov.law.harvard.edu/2019/07/26/2019-proxy-season-review-part-1-rule-14a-8-shareholder-proposals>. The comparisons are for the figures as of the middle of the two years, but most proposals are voted on by then.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ SULLIVAN & CROMWELL LLP, 2020 PROXY SEASON REVIEW: PART 1: RULE 14A-8 SHAREHOLDER PROPOSALS 2 (2020), <https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf>.

²⁴⁸ *Id.* at 3.

²⁴⁹ *Id.*

²⁵⁰ CERES, *supra* note 208, at 23–25.

²⁵¹ Philipp Krueger, Zacharias Sautner & Laura T. Starks, *The Importance of Climate Risks for Institutional Investors* 3–5 (Eur. Corp. Governance Inst., Working Paper No. 610/2019, 2019), <https://ssrn.com/abstract=3235190>.

²⁵² Barko et al., *supra* note 28, at 2.

²⁵³ *Id.* at 10, 13.

²⁵⁴ *Id.* at 3, 20.

A study on index fund voting on shareholder proposals found that close shareholder proposal votes that pass have a 2.04% higher one-day abnormal return than those that fail, but this is driven primarily by governance proposals.²⁵⁵ A survey of institutional investors on climate change engagement found that in 71% of the cases the targeted firms responded to their investors, but mostly that consisted of simply acknowledging the issue—successful completion of a typical engagement is reported by only 25% of those surveyed.²⁵⁶

Thus, the evidence suggests that at least some shareholder engagement does succeed in both creating the desired change by the target and also may improve firm performance by some measures. But that appears to be driven largely by governance proposals, the “G” in “ESG.” Systematic evidence on the effect of climate change proposals is hard to find, which is not surprising given how recent their rise has been and how rapidly they are evolving. The interviews described in the following two sections thus provide an important way to understand better the impact of this emerging engagement on climate change.

B. *U.S. Interview Findings*

In our interviews with the fourteen U.S. participants, questions concerning shareholder engagement included how they approach company-investor engagement; how investors use proposals to pressure companies on issues like climate change; how companies respond to proposals; whether proposals affect company practices related to climate change; and whether their employer supports proposals to limit use of Rule 14a-8. In the following sections, we describe some of the patterns we saw in their answers that provide a practice-based lens on some of the debates in the literature discussed above.

All of our participants saw ESG matters as receiving a greatly increased degree of attention from both investors and company management compared to the norm not that many years ago. This was regarded as true both for shareholder proposals and for more informal engagement between investors and companies. For instance, a director at an energy company commented, “I’ve been briefed that some large shareholders say, ‘don’t call us we’ll call you’ because everyone is doing more engagement.”²⁵⁷

Climate change was identified as one of the leading topics for shareholder engagement within the general rubric of environmental and social matters. Votes on these proposals are also increasing. As one investment manager at a non-profit foundation noted: “15% used to be a good showing on a social environmental proposal, and we are now getting

²⁵⁵ Adib, *supra* note 222, at 2.

²⁵⁶ Krueger, *supra* note 251, at 27.

²⁵⁷ Interview with US14 (Sept. 7, 2018).

majority votes on climate resolutions, at both big companies, like Occidental or Exxon, and even smaller companies; [that's] enough . . . to make corporate secretaries and boards pay attention."²⁵⁸

Participants noted that there is a two-way interaction between formal and public shareholder proposals, and informal and private dialogue. On the one hand, proposals often emerge after a process of informal discussion has gone on for a while. A sustainability officer at a food company described the process as follows:

Typically for us, we've been engaged with a shareholder for some period of time before they even file a resolution. So, we will have had at least three or four conversations with them, explaining our position, talking about what we're doing, and in some cases, talking about disclosure. There have obviously been cases where we've increased our disclosure of what we're doing, which resulted in not getting a resolution filed.²⁵⁹

On the other hand, sometimes a shareholder may use a proposal to initiate a conversation. A pension fund activist characterized the use of shareholder proposals as "really an invitation to engage" and "a way of trying to get the board's attention."²⁶⁰

Our interview findings indicate that companies' responses to receipt of climate-related shareholder proposals vary considerably. Some companies will engage little or not at all and either try to exclude the proposal or, alternatively, allow it to be included on the assumption that it will not receive majority approval. Other companies will engage with the proponents and try to assuage their concerns, either by convincing them that they are already behaving as the proponents wish or sometimes by changing their behavior to comply.²⁶¹ There is likely to be a trend for more companies to move to the latter, more responsive camp, as proposals become more common and attract more yes votes, and as large, actively engaged shareholders become more insistent. As one securities lawyer noted, clients opting to do nothing in response to a proposal were increasingly "a minority of companies in this day and age; most choose to engage."²⁶²

As for informal engagement dialogues, these can be in person or on the phone. On the investor side, our interviews indicated that a growing number of investors are bringing up climate change in their discussions with companies. A sustainability officer commented that this is particularly a focus of smaller ESG boutique investment firms, but "increasingly, large investment firms or shareholders are asking us to talk about these issues,

²⁵⁸ Interview with US3 (Aug. 30, 2018).

²⁵⁹ Interview with US5 (Sept. 27, 2018).

²⁶⁰ Interview with US10 (Nov. 9, 2018).

²⁶¹ Interview with US4 (Sept. 20, 2018); Interview with US9 (Oct. 30, 2018).

²⁶² Interview with US12 (Dec. 6, 2018).

[with it] typically [being] the ESG specialist from those firms that we're engaged with."²⁶³

On the company side, in an engagement where sustainability issues are likely to arise, company participants will often include someone from the corporate secretary's office or investor relations and a chief sustainability officer or another employee in the sustainability group. Directors are less likely to be involved, although they may join discussions with large shareholders. An investor-side participant from a company based in the United Kingdom, but with a U.S. presence, observed:

In the U.S., our positions are much smaller. It varies, but I would say that the most typical combination of people who are on the phone is the head of investor relations or some sort of corporate secretary and often they will bring their internal head of sustainability, head of CSR, head of environmental strategy. There's some content person who tends to be responsible for disclosure, and then maybe there's going to be some lawyer on the phone who's worried about disclosure issues.²⁶⁴

Several interview participants on the investor side noted a growing practice of engaging with groups of investors rather than one investor on its own. The groups could be informal networks, or through formal organizations and alliances. A former activist at a pension fund confirmed this trend of "collaboration with other shareholders," often as a way to overcome the capacity constraints of working alone.²⁶⁵

Interviewees noted that the topics of both shareholder proposals and informal engagement may not seem immediately relevant for climate change but are nonetheless importantly related. For instance, a number of proposals now ask companies to disclose their expenditures on lobbying. One pension fund activist involved with Climate Action 100 talked about filing a lobbying disclosure proposal directed at uncovering situations where companies "state one position publicly while spending their money privately in ways that are inconsistent with their public[ly] stated views."²⁶⁶

Another common type of proposal, not explicitly about climate change but relevant for achieving climate change-related aims, calls for proxy access, asking companies to adopt rules allowing shareholders to use the company proxy to nominate candidates for the board. This can then be used to pressure companies to put persons on the board with significant experience related to the environment, and climate change in particular—an emerging focus that several interview participants noted. As one interviewee said, "It's our strategy to try and elevate climate risk into the boardroom,

²⁶³ Interview with US5 (Sept. 27, 2018).

²⁶⁴ Interview with US6 (Oct. 5, 2018).

²⁶⁵ Interview with US13 (Dec. 12, 2018).

²⁶⁶ Interview with US10 (Nov. 9, 2018).

and if our boards aren't climate competent then [proxy access] gives investors a tool to put new directors on the board who may be a little more sensitive to those risks or knowledgeable."²⁶⁷

As with disclosure, the ultimate question about shareholder engagement is whether and how it is affecting underlying company operations and risk management. Engagement around climate change on a widespread basis is still quite new and rapidly evolving. Changes to behavior may take time and further evolution of engagement. Moreover, it is hard to disentangle the effects of engagement from a variety of other factors that are pushing companies to address climate change. Perhaps for these reasons, it is hard to discern from our interviewees clear and hard signs that engagement has yet significantly changed company behavior, but there are some signs of early achievements.

The reactions differed notably for interview participants on the company side versus those on the investor side. On the company side, the general reaction was that engagement may cause their company to more clearly and fully disclose what they are doing, but that they were already actively addressing climate issues before investor engagement, for other reasons.²⁶⁸ Noting the uncertainty on this issue, one said:

It's always a little hard to say where it's coming from, right? I mean the fact that at one meeting hearing you're getting a shareholder proposal on this issue. Does that have some incremental increase in your interest in asking questions about it at future meetings? Probably. But I think a lot of that, what the board discusses and what the board reviews is still very much driven by management putting the agenda together of what they view as most impacting the business.²⁶⁹

Interview participants on the investor side were sometimes more cautiously optimistic about the effects of engagement on behavior. They rarely identified specific effects, but they made two broader points. First, along the lines of the old adage, "you can't manage what you don't measure,"²⁷⁰ there is evidence of "incremental movement by these firms to (1) disclose more about what they know and (2) really start to think about internally what they do."²⁷¹ This was described as "a first step" and "a tracking mechanism," with the effect that as "more and more assets . . . are tied to these environmental performance indicators and as asset dollars move, that gets everyone's attention."²⁷²

²⁶⁷ *Id.*

²⁶⁸ Interview with US4 (Sept. 20, 2018); Interview with US5 (Sept. 27, 2018).

²⁶⁹ Interview with US12 (Dec. 6, 2018).

²⁷⁰ Interview with US10 (Nov. 9, 2018).

²⁷¹ Interview with US9 (Oct. 30, 2018).

²⁷² Interview with US6 (Oct. 5, 2018).

Second, investor participants expressed a view that engagement is changing communication and culture among directors and officers. For instance, one remarked, “I think we are changing conversations in the boardroom, which is healthy.”²⁷³ Another noted examples of “certain companies integrating environmental risk throughout the whole organization,” creating “a real culture shift.”²⁷⁴

C. Australian Interview Findings

Australia has a much more nascent experience of shareholder activism than the United States,²⁷⁵ but one that is evolving quickly and increasingly embracing activism with respect to climate change. In our twenty-four Australian interviews, we asked participants for their views on how climate-related shareholder proposals were impacting companies, and how this avenue compared to “behind-the-scenes” corporate-investor engagement on ESG issues.

In Australia, investors have traditionally preferred to engage privately with companies, with shareholder proposals (more commonly termed “resolutions” in Australia) seen as a more extreme approach, which was the purview of activist organizations.²⁷⁶ While private engagement remains a major avenue for company-investor dialogue, paralleling the United States, there has been a steady increase over the last decade in the number of resolutions brought to Australian companies addressing ESG issues, and, in particular, a more recent surge in resolutions addressing climate change specifically. The latter have been directed mostly at energy sector companies, including large electricity retailers such as Origin Energy and AGL, resource companies and large coal miners such as Whitehaven Coal, Rio Tinto, and BHP, and financiers and insurers with significant exposure to fossil fuel investments such as ANZ, Westpac, NAB, and QBE.²⁷⁷ Three general trends are discernable: (1) generalist institutional investors becoming involved in co-filing resolutions with civil society groups; (2) an increasing sophistication of the substantive demands made in resolutions related to climate risks, for instance, to address disclosure of transition planning or lobbying that is inconsistent with Paris temperature goals; and (3) resolutions receiving a higher percentage of the shareholder vote at companies’ annual general meetings (AGMs).²⁷⁸

²⁷³ Interview with US10 (Nov. 9, 2018).

²⁷⁴ Interview with US6 (Oct. 5, 2018).

²⁷⁵ Interview with AUS5 (Mar. 2, 2018).

²⁷⁶ Interview with AUS3 (Jan. 13, 2018); Interview with AUS4 (Mar. 7, 2018); Interview with AUS5 (Mar. 2, 2018); Interview with AUS8 (Mar. 15, 2018).

²⁷⁷ See generally AUSTRALASIAN CTR. FOR CORP. RESP., *supra* note 98.

²⁷⁸ See *Australian ESG Shareholder Resolutions*, *supra* note 98; cf. Attracta Mooney, *Big Australian Investors Under Scrutiny over Climate Change*, FIN. TIMES (Jan. 18, 2020), <https://www.ft.com/content/de4317c0-f8da-4ec5-85bb-337ddcdad1> (finding that big asset managers and pension funds failed to support any climate change resolutions at Australian businesses during the 2018–19 annual meeting).

The legal framework for shareholder resolutions in Australia has notable differences from that of the United States, with more constraints on the use of non-binding, advisory resolutions. As discussed above, however, recent developments in U.S. practice to limit ESG and climate-related shareholder proposals may result in more convergence in the future. To bring an “ordinary resolution” to a company’s AGM in Australia, shareholders require a minimum of 5% of the votes or a group of at least 100 shareholders.²⁷⁹ This threshold would be prohibitively high in the United States but has not proved to be the main barrier to shareholder resolutions in Australia. Rather, companies have declined to put these resolutions to the AGM on the basis that they unduly interfere in the board’s management powers.²⁸⁰ This interpretation was upheld by Australia’s Federal Court in a test case concerning climate change resolutions put to the AGM of the Commonwealth Bank of Australia.²⁸¹ As a result of this restriction, more recent shareholder resolutions on climate change have been brought in two parts, with a first resolution seeking to amend the company’s constitution to permit non-binding advisory resolutions, and a second resolution presenting the substantive demands regarding the board’s management of climate change risks.²⁸² While constitutional amendments require a 75% majority vote²⁸³ and are therefore highly unlikely to pass, the advantage of this strategy is that the board is required to put the resolution to the AGM. In

season); see also FIONA DEUTSCH, DANIEL GOCHER & ACCR STAFF, TWO STEPS FORWARD, ONE STEP BACK: HOW AUSTRALIA’S LARGEST SUPER FUNDS VOTED ON SHAREHOLDER PROPOSALS 2017–2019 (2020), https://www.accr.org.au/research/two_steps_forward/ (reporting the proxy voting records of Australia’s fifty largest superfunds).

²⁷⁹ *Corporations Act 2001* (Cth) s 249N(1)(a)–(b).

²⁸⁰ In particular, members cannot use their powers to requisition a members’ meeting (ss 249D, 249F) or demand a motion be put to a members’ meeting (s 249N) if the subject is a matter exclusively within the purview of the board. See generally Michael Jefferies, *The Third Wave of Shareholder Influence and the Emergence of Informational Activism in Australia*, 34 AUSTL. J. CORP. L. 305 (2019) (detailing shareholders’ participatory rights and judicially-imposed limitations); Stephen Bottomley, *Rethinking the Law on Shareholder-Initiated Resolutions at Company General Meetings*, 43 MELBOURNE U. L. REV. 93 (2019) (“Since *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* in 1906, courts have held that if a company’s constitution gives directors the power of company management, shareholders cannot interfere with the exercise of that power”).

²⁸¹ See first instance decision at *Australasian Ctr. for Corp. Resp. v Commonwealth Bank of Austl.* (2015) 325 ALR 736; upheld on appeal in *Australasian Ctr. for Corp. Resp. v Commonwealth Bank of Austl.* (2016) 248 FCR 280.

²⁸² For example, substantive resolutions on “Paris Goals and Targets” and “climate-related lobbying” put at the Woodside AGM in 2020 were contingent on a resolution to amend the company constitution allowing shareholders to bring non-binding advisory resolutions: “The shareholders in general meeting may by ordinary resolution express an opinion, ask for information, or make a request, about the way in which a power of the company partially or exclusively vested in the directors has been or should be exercised.” WOODSIDE, NOTICE OF ANNUAL GENERAL MEETING 2020, at 5, <https://www.asx.com.au/asxpdf/20200320/pdf/44g80mllwk2051.pdf>.

²⁸³ *Corporations Act 2001* (Cth) ss 9, 136(2).

most cases, companies have also allowed a vote on the substantive element of the resolution and reported this vote publicly.²⁸⁴

Our interviews with Australia participants indicated a shifting attitude to shareholder engagement on climate issues, with “investors . . . much more willing to use every tool available to them in the toolkit,”²⁸⁵ including resolutions and potentially also the divestment of shares if companies are unresponsive. When large institutional investors—often pension (or “superannuation”) funds in an Australian context—were involved in shareholder resolutions, this was often seen as a strategy to escalate engagement with a company that was failing to adequately respond to private engagement on climate change.²⁸⁶

Investors voting on climate resolutions in an Australian setting demonstrate a similar variation of approaches to voting their shares as those in the United States. Some funds remain committed to more traditional engagement approaches and would be unlikely to vote against management except in extreme situations.²⁸⁷ Further, they would be particularly uncomfortable with supporting constitutional amendments as a way to effect change on climate risks. Others will assess each case on its merits and then make a decision to engage behind-the-scenes on the resolution or to vote in a certain way.²⁸⁸ Some Australian funds, notably superannuation funds such as Local Government Super, have even taken the lead in co-filing climate resolutions.²⁸⁹ Several funds also noted that their approach to voting shares differs between jurisdictions: in Australia, where they perceive good access to boards and a strong engagement culture, these funds are more likely to vote with management and not support a resolution, even though they may vote in favor of an almost identical resolution in other jurisdictions such as the United States.²⁹⁰

²⁸⁴ In 2020, some climate change resolutions received new levels of support, e.g., resolutions on Paris goals and targets put at Santos (43.49%) and Woodside’s (50.16%) AGMs. *Australian ESG Shareholder Resolutions*, *supra* note 97. See also Angela Macdonald-Smith, *Woodside to Face Grilling on Climate Action*, AUSTL. FIN. REV. (Apr. 27, 2020, 12:00 AM), <https://www.afr.com/companies/energy/woodside-to-face-grilling-on-climate-action-20200424-p54n0x> (with key proxy advisor, CGI Glass Lewis, going against the board and voicing support for resolutions at Woodside); Attracta Mooney & Patrick Temple-West, *Climate Change: Asset Managers Join Forces with the Eco-Warriors*, FIN. TIMES (July 26, 2020), <https://www.ft.com/content/78167e0b-fdc5-461b-9d95-d8e068971364> (noting the results of Santos’ shareholder vote).

²⁸⁵ Interview with AUS6 (Mar. 22, 2018).

²⁸⁶ Interview with AUS18 (Apr. 26, 2018); Interview with AUS19 (June 6, 2018); Interview with AUS20 (June 4, 2018); Interview with AUS21 (May 30, 2018); Interview with AUS22 (Apr. 27, 2018); Interview with AUS2 (Apr. 26, 2018); Interview with AUS24 (May 17, 2018).

²⁸⁷ Interview with AUS18 (Apr. 26, 2018); Interview with AUS24 (May 17, 2018).

²⁸⁸ Interview with AUS19 (June 6, 2018); Interview with AUS20 (June 4, 2018); Interview with AUS21 (May 30, 2018); Interview with AUS22 (Apr. 27, 2018).

²⁸⁹ In 2018, resolutions put to QBE Australia (part of the QBE Insurance Group, one of the world’s top twenty general insurance and reinsurance companies) were co-filed by Local Government Super (a medium sized Australian superannuation fund) together with the Church of England Pensions Board and the Swedish National Pension Fund (representing \$84 billion worth of assets under management). AUSTL. COUNCIL OF SUPERANNUATION INVS., CORPORATE SUSTAINABILITY REPORTING IN AUSTRALIA 27 n.10 (2018).

²⁹⁰ Interview with AUS22 (Apr. 27, 2018); Interview with AUS24 (May 17, 2018).

Regarding the question of whether shareholder engagement, and particularly the use of shareholder resolutions, helps shift corporate behavior on climate change, our Australian interview findings revealed a similar divide to that among U.S. interviewees. On the investor and civil society side, interviewees expressed optimism that recent shareholder resolutions had produced tangible changes in the approaches taken by target companies to climate risks. But they emphasized that these changes were occurring in the context of ongoing private engagement and also emerging targeted climate change engagements being pursued by coalitions of investors, such as Climate Action 100+. ²⁹¹ At the same time, the overall response of Australian companies to the lodging of shareholder resolutions on climate change was described as generally defensive, often quite adversarial or dismissive. ²⁹² From the company side, participants did however report a shift in their approach to climate-related resolutions, including increased emphasis on engagement with investors on climate risk. ²⁹³ Various factors affected the nature of the company's response, such as whether resolutions had broader investor backing and the level of support for the resolution. ²⁹⁴ As one interviewee expressed it, echoing a similar sentiment seen in the United States, "even . . . five percent of shareholders voting against management is significant . . . when you start getting up around that ten to fifteen percent mark, things get very serious for a board." ²⁹⁵

These findings suggest the Australian experience of shareholder engagement on climate change is largely tracking that in the United States even though the use of climate-related shareholder resolutions is a more recent phenomenon there. This is despite the significant legal constraints on the filing of ordinary shareholder resolutions in Australia. Indeed, these constraints seem to have spurred experimentation in Australia with shareholder resolutions that may offer useful lessons for U.S. practice. This includes more sophisticated substantive demands, such as efforts to expose whether companies' lobbying strategies are consistent with Paris Agreement

²⁹¹ Interview with AUS3 (Jan. 13, 2018); Interview with AUS4 (Mar. 7, 2018); Interview with AUS5 (Mar. 2, 2018); Interview with AUS6 (Mar. 22, 2018); Interview with AUS7 (Feb. 23, 2018); Interview with AUS8 (Mar. 15, 2018). Climate Action 100+ is an engagement initiative launched in 2017 backed by 450 investors with nearly USD \$40 trillion in assets under management. It is delivering a five-year program of engagement with important greenhouse gas emitters and other companies highly exposed to climate risk across the global economy that have significant opportunities to drive the clean energy transition. Investors are calling on companies to improve governance on climate change, curb emissions and strengthen climate-related financial disclosures by implementing the recommendations of the TCFD. *About Us* (2020), CLIMATE ACTION 100+, <https://climateaction100.wordpress.com/about-us/>.

²⁹² Interview with AUS3 (Jan. 13, 2018); Interview with AUS4 (Mar. 7, 2018); Interview with AUS8 (Mar. 15, 2018); Interview with AUS9 (June 18, 2018); Interview with AUS22 (Apr. 27, 2018); Interview with AUS23 (Apr. 26, 2018).

²⁹³ Interview with AUS9 (June 18, 2018); Interview with AUS11 (Apr. 27, 2018); Interview with AUS13 (Aug. 20, 2018).

²⁹⁴ Interview with AUS3 (Jan. 13, 2018); Interview with AUS5 (Mar. 2, 2018); Interview with AUS11 (Apr. 27, 2018).

²⁹⁵ Interview with AUS3 (Jan. 13, 2018).

temperature goals. The Australian experience also demonstrates the potential effectiveness of more informal company-investor engagement strategies in advancing companies' responses to climate risk where climate change is an issue of concern for investors. This kind of engagement has been facilitated in Australia by the concentrated shareholding of large institutional investors, such as superannuation funds, in the ASX200.²⁹⁶ Potentially, the United States may be moving in a similar direction with the growing influence of the "Big Three" and their preference for using engagement over shareholder proposals.

IV. FIDUCIARY DUTY

The final legal tool considered in this Article focuses on the fiduciary duties of directors and officers. Directors and officers have a duty to act loyally on behalf of their corporation.²⁹⁷ Some have advocated suing boards that have failed to adequately monitor and manage risks arising from climate change. Such suits aim to encourage a faster energy transition by causing companies to shift resources from dirtier to cleaner operations.²⁹⁸ To date, no cases seeking to enforce such a duty in a climate change context have been brought in the United States, but there has been discussion both here and more extensively in other countries, such as Australia, about the possibility of such suits.²⁹⁹ Even without such suits, many companies have revised their risk management practices to recognize climate change risks. This Part explores the law surrounding monitoring of climate change risk and how corporate practice has developed.

A. *Legal and Institutional Developments*

There is some concern that the duty of loyalty could inhibit consideration of sustainability matters like climate change because the duty

²⁹⁶ ELLIS, *supra* note 95.

²⁹⁷ For an overview, see Claire A. Hill & Brett H. McDonnell, *Fiduciary Duties: The Emerging Jurisprudence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 133 (Claire A. Hill & Brett H. McDonnell, eds., 2012).

²⁹⁸ Osofsky et al., *Energy Re-Investment*, *supra* note 4.

²⁹⁹ *Id.* at 610–11, 635. See generally HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25 (explaining that directors should consider the impact of climate change risks on their businesses and failure to do so could lead to liability for breach of their duty of care and diligence); NOEL HUTLEY & JAMES MACK, MARKET FORCES: SUPERANNUATION FUND TRUSTEE DUTIES AND CLIMATE CHANGE RISK: MEMORANDUM OF OPINION (2017) (“[C]limate change risks can and should be considered by trustee directors to the extent that those risks intersect with the financial interests of a beneficiary of a registrable superannuation entity.”); KEITH BRYANT & JAMES RICKARDS, THE LEGAL DUTIES OF PENSION FUND TRUSTEES IN RELATION TO CLIMATE CHANGE: ABRIDGED JOINT OPINION (2016) (explaining that trustees have a legal duty to consider financial risks associated with climate change); CLIENTEARTH, RISKY BUSINESS: CLIMATE CHANGE AND PROFESSIONAL LIABILITY RISKS FOR AUDITORS (2017) (describing climate change as a financial risk and advising auditors to consider reflecting that risk in annual accounts and reports).

requires maximizing financial returns to shareholders.³⁰⁰ However, addressing climate change often improves the long-term profitability of companies,³⁰¹ and given the broad discretion granted by the business judgment rule, directors need not fear liability for addressing climate change as long as they plausibly link the issue to long-term profitability.³⁰²

There is a more affirmative potential use of fiduciary duty. Suits enforcing this duty could become part of a new wave of climate change litigation. An early wave of litigation focused mostly on claims based in tort and environmental law.³⁰³ A second wave of litigation is focused on federal and state securities law claims, arguing to false and misleading disclosure by companies (mostly energy companies) that allegedly were well aware of the risks to their business models of climate change.³⁰⁴

Our focus here is on a potential new wave of litigation based on state corporate law fiduciary duty. In 1996, the Delaware Chancery Court held that directors have “a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists.”³⁰⁵ Some argue that given the significant risks that climate change poses to the business of many corporations, this *Caremark* duty creates a risk of liability for the boards of such corporations should they fail to adequately monitor and respond to those risks.³⁰⁶

Any such suit would confront serious obstacles. Liability under *Caremark* is extremely unlikely. The *Caremark* Court called it “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.”³⁰⁷ The court said that “only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.”³⁰⁸ In over two decades since *Caremark* was decided, only a few cases have even survived motions to dismiss.³⁰⁹

³⁰⁰ eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); McDonnell, *supra* note 11.

³⁰¹ *Supra* notes 37–45 and accompanying text.

³⁰² See generally Osofsky et al., *Energy Re-Investment*, *supra* note 4 (discussing using a director’s fiduciary duties as a tool to promote energy reinvestment); Joan MacLeod Heminway, *Let’s Not Give Up on Traditional For-Profit Corporations for Sustainable Social Enterprise*, 86 UKMC L. REV. 779 (2018) (discussing theories about the role of a director which may include interests of other potential stakeholders in addition to the shareholders).

³⁰³ Hari M. Osofsky & Jacqueline Peel, *Litigation’s Regulatory Pathways and the Administrative State: Lessons from U.S. and Australian Climate Change Governance*, 25 GEO. INT’L ENV’T. L. REV. 207, 210 (2013).

³⁰⁴ See *supra* note 104.

³⁰⁵ *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

³⁰⁶ Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors’ Duties*, 2020 UTAH L. REV. 313, 313 (2020).

³⁰⁷ *Caremark*, 698 A.2d at 967.

³⁰⁸ *Id.* at 971.

³⁰⁹ Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2013 (2019).

But two recent cases have increased the odds of success of a *Caremark* claim. In upholding *Caremark*, the Delaware Supreme Court specified two ways in which plaintiffs could claim oversight liability: “(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.”³¹⁰ For each of these two paths, plaintiffs have recently survived a motion to dismiss.

In *Marchand v. Barnhill*, the Delaware Supreme Court overturned a Chancery Court dismissal of a suit against Blue Bell Creameries.³¹¹ After a listeria outbreak caused by Blue Bell’s ice cream, the court found the complaint adequately alleged the company had no monitoring system at all. The lack of a food safety monitoring system in a regulated company that only produces ice cream was critical to the court.³¹² *In re Clovis Oncology, Inc. Derivative Litigation* involved a drug clinical trial by a biopharmaceutical company.³¹³ Here there was a monitoring system, but the board allegedly ignored numerous facts that raised red flags showing that the trial failed to follow standard protocol and regulations.³¹⁴

Though these cases indicate some life within *Caremark*, potential plaintiffs cannot take too much comfort. They only involve motions to dismiss, and the courts emphasize the importance of the fact that the companies had just one product line in a highly regulated industry, so that compliance with those regulations was central to the business.

Even more important for the prospect of climate claims, *Caremark* involved legal compliance oversight, as did those few cases which have allowed *Caremark* claims to continue. Plaintiffs have tried to extend *Caremark* to monitoring business risk. The Delaware courts have never accepted this extension, and their comments suggest great skepticism.³¹⁵ Some think this limitation to legal compliance is the appropriate function of *Caremark*.³¹⁶ Others argue that monitoring business risk is functionally very similar to compliance risk, so that *Caremark* could apply to business risk as well,³¹⁷ and some argue that *Caremark* liability should apply where boards

³¹⁰ *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

³¹¹ 212 A.3d 805, 820 (Del. 2019).

³¹² *Id.* at 822–23.

³¹³ No. 2017-0222-JRS, 2019 WL 4850188, at *2 (Del. Ch. Oct. 1, 2019).

³¹⁴ *Id.* at *13, *15.

³¹⁵ Pollman, *supra* note 309, at 2017; Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859, 862–63 (2013).

³¹⁶ See, e.g., Pollman, *supra* note 309, at 2020–21 (discussing the Delaware Supreme Court’s decision *In re Walt Disney Co.*, allowing directors to take business risk while drawing a line at legal risk); Robert T. Miller, *Oversight Liability for Risk-Management Failures at Financial Firms*, 84 S. CAL. L. REV. 47, 96 (2010) (discussing how the expansion of oversight liability would mean courts would be reviewing business judgments on the merits).

³¹⁷ Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 979 (2009).

fail to supervise risks that impose serious social harms.³¹⁸ But case law does not extend beyond extreme legal compliance oversight failures.

Thus, if a plaintiff claims that a company broke a law related to climate change and the board failed to adequately monitor compliance with that law, *Caremark* and its progeny offer some limited hope, particularly if climate risk is truly central to the company's business model and it either had no legal compliance system in place at all or the board ignored major red flags. But if the claim is that the board ignored risks that climate change poses to financial performance, a *Caremark* suit seems doomed to fail, absent major change in the case law.

Even if the risk of legal liability is negligible, a threatened *Caremark* suit could still affect director behavior. Companies may choose to have aggressive compliance programs to avoid any chance of liability given legal uncertainty.³¹⁹ Regulators encourage companies to have robust compliance programs.³²⁰ Reputational concerns may also encourage companies to go beyond the minimum required to avoid *Caremark* liability.³²¹

Oversight duty suits may have a greater chance of success in other countries. We discuss the situation in Australia below.³²² In Poland, ClientEarth sued (as a shareholder) two energy companies, Enea and Energa, over construction of a new coal-fired power plant, claiming that the project posed unjustifiable financial risks in the context of rising carbon prices, increased competition from cheaper renewables, and the impact of EU energy reforms on state subsidies for coal power.³²³ A District Court held in ClientEarth's favor, although on other grounds.³²⁴ In the United Kingdom, ClientEarth has written to fourteen pension funds asking them to disclose what steps they are taking on climate risk and threatening legal action if those steps are not sufficient.³²⁵ A prominent Canadian law professor argues that Canadian law imposes a duty on companies to monitor climate change risks.³²⁶ This may be an area where Delaware is less responsive to shareholders than courts in other countries.

³¹⁸ Hill & McDonnell, *supra* note 315, at 860–61.

³¹⁹ Hill, *Caremark as Soft Law*, *supra* note 42, at 684–85.

³²⁰ *Id.* at 689.

³²¹ *Id.* at 688–89.

³²² *Infra* Section IV.C.

³²³ Media Release, ClientEarth, Court Win in World-First Climate Risk Case Puts Future of Ostrołęka C Coal Plant in Question (Aug. 1, 2019), <https://www.clientearth.org/press/court-win-world-first-climate-case-ostroleka-c-future-in-question/>.

³²⁴ *Id.* An English translation of the decision is on file with the authors. The District Court found that the resolution consenting to construction of the plant was an impermissible instruction to the Board and therefore legally invalid; it did not, however, reach the question of whether the project would harm the economic interests of the company.

³²⁵ *Top UK Pension Funds Put on Notice Over Climate Risk*, CLIENTEARTH (Aug. 13, 2018), <https://www.clientearth.org/top-uk-pension-funds-put-on-notice-over-climate-risk/>.

³²⁶ JANIS SARRA, COMMONWEALTH CLIMATE & L. INITIATIVE, FIDUCIARY OBLIGATIONS IN BUSINESS AND INVESTMENT: IMPLICATIONS OF CLIMATE CHANGE 16–17 (2018), <https://ssrn.com/abstract=3356024>;

Even without legally binding obligations, boards monitor business risks, and best practices have evolved rapidly. A widely cited comprehensive approach is the COSO Enterprise Risk Management Framework. COSO issued guidance for a framework on enterprise risk management in 2004, which was updated in 2017.³²⁷ In 2018, COSO and the World Business Council for Sustainable Development (WBCSD) issued guidance on how the COSO framework applies to ESG risks.³²⁸ The guidance stresses that ESG matters pose financial risks to companies in the short, medium, and long term and that this understanding brings ESG risks within mainstream risk management processes.³²⁹ The guidance stresses collaboration between the board, executive management, and sustainability practitioners, as well as internal and external communication of ESG risks.³³⁰

Ceres has recently issued guidance on board oversight of ESG issues.³³¹ This also recommends stakeholder and shareholder input,³³² regular board discussion of ESG risks and integration into strategic planning,³³³ incorporating ESG factors into executive compensation,³³⁴ and building ESG factors into both audit committee and other relevant board committee processes.³³⁵ Still, not all boards follow best practices. A 2019 PwC survey of corporate directors found that 56% (up from 29% in 2018) of directors say shareholders are too focused on environmental and sustainability issues,³³⁶ and 46% think climate change should either have limited or no impact on company strategy.³³⁷

At both the board and management levels, a critical question is who has responsibility for monitoring ESG risks. The full board has some responsibility, but there is a need to have more focus at the board committee level as well. The audit committee is responsible for overall risk monitoring, but should it be primarily responsible for ESG risks, or should another committee be charged with that? Large corporations increasingly have sustainability teams. Should management-level responsibility be primarily with them, and to whom should they report? What role do other departments

JANIS SARRA & CYNTHIA WILLIAMS, COMMONWEALTH CLIMATE & L. INITIATIVE, DIRECTORS' LIABILITY AND CLIMATE RISK: CANADA - COUNTRY PAPER 9-10 (2018).

³²⁷ COSO, ENTERPRISE RISK MANAGEMENT — INTEGRATED FRAMEWORK, <https://www.coso.org/Pages/erm-integratedframework.aspx> (last visited Mar. 31, 2021).

³²⁸ COSO & WBCSD, ENTERPRISE RISK MANAGEMENT: APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE-RELATED RISKS (2018).

³²⁹ *Id.* at 7.

³³⁰ *Id.* at 8-9.

³³¹ CERES, RUNNING THE RISK: HOW CORPORATE BOARDS CAN OVERSEE ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) ISSUES (2019).

³³² *Id.* at 16.

³³³ *Id.* at 18.

³³⁴ *Id.* at 22.

³³⁵ *Id.* at 23, 25.

³³⁶ PwC, THE COLLEGIALITY CONUNDRUM: FINDING BALANCE IN THE BOARDROOM—PWC'S 2019 ANNUAL CORPORATE DIRECTORS SURVEY 19 (2019).

³³⁷ *Id.* at 31.

such as compliance, legal, and audit play? There is a tradeoff. Giving responsibility to a specialized group will ensure someone has expertise and incentive to pay attention to climate change. But there is a risk of becoming siloed, leaving central decisionmakers out of touch. The COSO and WBCSD and Ceres guidances suggest some specialization but also much coordination between various departments, committees, and levels.³³⁸

B. *U.S. Interview Findings*

In our interviews with the fourteen U.S. participants, we asked several open-ended questions concerning fiduciary duty and risk oversight and management related to climate change. These included how climate change issues filter up to the board; the lines of communication and processes in place around climate change; whether independent advice is sought, and, if so, from whom and how; and whether they perceived a widespread understanding among U.S. directors about how fiduciary duties apply to climate change. We describe here some of the patterns that emerged in the participants' answers.

Although directors and officers are very much aware of the duty to oversee and manage corporate risk, the understanding of the role of climate risks within that duty is mixed. Investors tend to view the duty as encompassing climate risks, but when engaging with companies do not "hang their hat on the fiduciary duty piece."³³⁹ Perceptions also vary by industry, which to some extent is appropriate. A securities lawyer thus noted:

If you are an energy company it is very different. You probably have this fully integrated in your business and in your thinking. You just have to. But I think for the bulk of our clients that are in the manufacturing space it is still not. Margin is still more important than climate change.³⁴⁰

Another interviewee, who is a pension fund activist, generally concurred with this view, commenting:

A lot of boards are just trying to fend off a hedge fund or other short-term thinking which kind of contradicts any long-term planning that they would do. It's another big elephant in the room. Unless the company is managing and thinking about the long-term, this kind of stuff doesn't make sense to them.³⁴¹

For those companies addressing climate risk, our interview findings revealed a great deal of variation in how companies allocate responsibility for that risk, and ESG risk more generally. Some examples give a sense of

³³⁸ COSO & WBCSD, *supra* note 328, at 13–21; CERES, *supra* note 331, at 8–27.

³³⁹ Interview with US9 (Oct. 30, 2018).

³⁴⁰ Interview with US12 (Dec. 6, 2018).

³⁴¹ Interview with US13 (Dec. 12, 2018).

the range of options. At a retail company, the board's nomination and governance committee is responsible for corporate social responsibility issues, and there is a CSR management team.³⁴² At a food company, a public responsibility committee handles reputational risk related to sustainability, there is a sustainability group, and a governance committee of top managers discusses risks of all types.³⁴³ Another company has a matrixed reporting environment, where the sustainability group reports to finance and legal, and sometimes to the board as well.³⁴⁴ At another company there are two sustainability teams and a sustainability executive advisory team.³⁴⁵ At an energy company, both the audit committee and an operations, environmental, and safety committee oversee ESG risk.³⁴⁶

Beyond internal company structures, a number of participants discussed outreach to various stakeholders other than shareholders on a regular basis on ESG and climate issues. At a food company, one participant commented:

[W]e're engaged with quite a few NGOs, but campaigning NGOs like Greenpeace as well as operational NGOs like The Nature Conservancy or World Wildlife Fund or the Xerxes Society, who are actually doing things on the ground We talk to anybody who wants to talk to us about these issues, and in some cases we rely on their technical expertise.³⁴⁷

An energy company director noted his company has an annual stakeholder meeting that is large and comprehensive, with the CEO attending.³⁴⁸

As in the case of shareholder engagement,³⁴⁹ a number of interviewees discussed the emerging focus on having board expertise around climate or more general environmental issues. A participant who works as a consultant described this as "a growing trend."³⁵⁰ A question is what counts as environmental expertise, with "a lot of reinterpreting people's experience in that space."³⁵¹ As a mutual fund manager participant remarked, "It doesn't have to be an environmental scientist that you're sticking on a board, that has no relevant experience, but someone who just has a real appreciation for this kind of broader risk."³⁵² A securities lawyer noted that this kind of experience may slowly grow across companies over time, with a "ripple effect"³⁵³ as "you get the board members having been people who were part

³⁴² Interview with US4 (Sept. 20, 2018).

³⁴³ Interview with US5 (Sept. 27, 2018).

³⁴⁴ Interview with US9 (Oct. 30, 2018).

³⁴⁵ Interview with US11 (Nov. 15, 2018).

³⁴⁶ Interview with US14 (Sept. 7, 2018).

³⁴⁷ Interview with US5 (Sept. 27, 2018).

³⁴⁸ Interview with US14 (Sept. 7, 2018).

³⁴⁹ *Supra* note 260 and accompanying text.

³⁵⁰ Interview with US9 (Oct. 30, 2018).

³⁵¹ *Id.*

³⁵² Interview with US6 (Oct. 5, 2018).

³⁵³ Interview with US12 (Dec. 6, 2018).

of an executive team that was spending more time on that.”³⁵⁴ One lawyer also noted that “some companies are starting to pay attention to how compensation affects the incentives to pay attention to ESG matters.”³⁵⁵

No duty to monitor climate change risk suits have yet been brought in the United States, so they were not yet on the radar screen for most of our participants as a factor that might drive shifts in corporate behavior around climate change. However, several participants remarked that such a suit, if it were to emerge, would get a company’s attention. As one participant noted, in the litigious U.S. market, “the risk of a lawsuit gets everyone’s attention in a way that I think can trump anything else in terms of focus.”³⁵⁶

C. Australian Interview Findings

Directors’ duties under Australian corporate law are of similar content to fiduciary duties under Delaware law, although broader interpretations, and a “public interest” orientation of enforcement in Australia, potentially enhance the prospects of a successful lawsuit.³⁵⁷ The principal duties considered most likely to be a basis for finding liability in a climate change context are the duty of due care and diligence, and duties related to the disclosure of business risks.³⁵⁸ In our interviews with Australian participants, we asked them for their views of whether companies see such duties as extending to climate risks, and what response was being taken by directors, if any, as a result. The following sections first explain the relevant duties that apply under Australian corporate law and then highlight key findings from the interviews about how these duties are being interpreted by Australian companies in practice.

For the duty of due care and diligence, under Australian law, directors must show they exercised the degree of care and diligence that a reasonable

³⁵⁴ *Id.*

³⁵⁵ Interview with US12 (Dec. 6, 2018).

³⁵⁶ Interview with US6 (Oct. 5, 2018).

³⁵⁷ As discussed *supra* note 93, the term “fiduciary duties” is used as a convenient shorthand in this section to cover directors’ duties, but in fact the duty of due care is not a “fiduciary” duty under Australian law as it is both a common law duty and an equitable duty. For a comparative discussion of fiduciary duties and public interest norms, see Jennifer G. Hill, *Shifting Contours of Directors’ Fiduciary Duties and Norms in Comparative Corporate Governance*, CLS BLUE SKY BLOG (Feb. 5, 2020), <https://clsbluesky.law.columbia.edu/2020/02/05/shifting-contours-of-directors-fiduciary-duties-and-norms-in-comparative-corporate-governance>.

³⁵⁸ HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25, para. 51. This position was reaffirmed in their 2019 opinion, HUTLEY & HARTFORD DAVIS, 2019 MEMORANDUM, *supra* note 25, para. 2. Significantly, their 2019 opinion also gave importance to the 2018 IPCC report. IPCC, *supra* note 55, at 10–13. The 2019 opinion also provided guidance that directors should be assessing the possible of impacts of (and steps to avoid) 1.5°C scenarios. HUTLEY & HARTFORD DAVIS, 2019 MEMORANDUM, *supra* note 25, para. 14. The *Corporations Act 2001* also provides additional duties in s 181(1): the duty to act in the “best interests of the corporation” and the duty to act “for a proper purpose.” *Corporations Act 2001* (Cth) s 181(1). See also AUSTIN & RAMSAY, *supra* note 92, para. 8.065 (for discussion of these duties).

person in their circumstances would exercise.³⁵⁹ As in the United States, directors can raise a defense of “business judgment.” However, this operates only in relatively narrow circumstances where directors can show, *inter alia*, that they “inform[ed] themselves about the subject matter of the judgment to the extent they reasonably believe[d] to be appropriate; and . . . rationally believe[d] that the judgment was in the best interests of the corporation.”³⁶⁰ This imposes a relatively high threshold for invocation of the business judgment rule compared to the United States.³⁶¹

Although Australia, like the United States, has not yet seen a climate change breach of duty suit against company directors, there has been extensive consideration of this possibility in two legal opinions from leading commercial law advocates commissioned by the NGO, the Centre for Policy Development. In these opinions, Noel Hutley SC and barrister Sebastian Hartford Davis outlined how the duty of due care and diligence would apply to climate change based on existing statutory law and case law interpretations.³⁶² They concluded that, as a general matter, there is ample evidence that climate change is likely to pose potentially foreseeable harm to company interests in many situations.³⁶³ As a result they advised, at a minimum:

[D]irectors should consider and, if it seems appropriate, take steps to inform themselves about climate-related risks to their business, when and how those risks might materialize, whether they will impact the business adversely or favorably, whether there is anything to be done to alter the risk, and otherwise to consider how the consequences of the risk can be met. In complex situations . . . a director is permitted to and should seek out expert or professional advice pursuant to s189 of [the Corporations] Act.³⁶⁴

The Hutley/Hartford Davis opinions have been described by ASIC (the Australian equivalent of the SEC) as “legally sound and . . . reflective of our understanding of the position under the prevailing case law in Australia in so far as directors’ duties are concerned,”³⁶⁵ thus amplifying their influence. Speaking at a climate roundtable in late 2019, former Justice of the High Court and Royal Commissioner Kenneth Hayne AC QC concluded: “in Australia, a director acting in the best interests of the company must take

³⁵⁹ *Corporations Act 2001* (Cth) s 180(1).

³⁶⁰ *Id.* s 180(2).

³⁶¹ BARKER, *supra* note 66, at 14.

³⁶² HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25; HUTLEY & HARTFORD DAVIS, 2019 MEMORANDUM, *supra* note 25.

³⁶³ HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25, at paras. 14–33.

³⁶⁴ *Id.* at para. 37.

³⁶⁵ Price, *supra* note 26.

account of, and the board must report publicly on, climate-related risks and issues relevant to the entity.”³⁶⁶

Further, commentators, such as MinterEllison lawyer Sarah Barker, have discussed specific circumstances where directors may be in breach of the duty of care and diligence in relation to climate risk.³⁶⁷ These include situations where there is either “[a] total failure to consider and govern for climate change risks in strategic planning and risk management,” or “[i]nadequate or deficient consideration and/or governance of climate change-related risk exposures.”³⁶⁸ Hutley and Hartford Davis themselves described the prospect of “litigation against a director who has failed to perceive, disclose or take steps in relation to a foreseeable climate-related risk that can be demonstrated to have caused harm to a company (including, perhaps, reputational harm)” as “likely to be only a matter of time.”³⁶⁹

Such liability theories have been tested in the recently settled case against the REST superannuation fund, which alleged that the fund’s corporate trustee failed to act with care, skill, and diligence, and in the best interests of beneficiaries by not adequately considering the risks posed by climate change to the fund’s investment portfolio in the best interests of its members.³⁷⁰ While the *REST* case did not concern directors’ duties under corporate law, it tested the scope of similar trustees’ duties under prudential laws applicable to superannuation funds.³⁷¹ In an initial procedural ruling in the case delivered by Justice Perram of the Australian Federal Court, his Honor determined that it was legitimate to characterize the litigation as a public interest suit as “[t]he case appear[ed] to raise a socially significant issue about the role of superannuation trusts and trustees in the current public

³⁶⁶ Kenneth Hayne AC QC, *Full Text of Kenneth Hayne AC QC Remarks to CPD Climate Roundtable*, CTR. FOR POL’Y DEV. (Nov. 21, 2019), <https://cpd.org.au/2019/12/full-text-of-kenneth-hayne-ac-qc-remarks-to-cpd-climate-roundtable>.

³⁶⁷ In thinking about how the Australian duty of care might develop to promote action by directors to deal with climate change, a member of our Expert Reference Group for this research—Professor Ian Ramsay of Melbourne Law School—noted that the development of so-called “stepping stones” liability might possibly provide a pathway. There is now a series of judgments by Australian courts where directors have been held to breach their duty of care by allowing the company to breach the Corporations Act. See, e.g., *ASIC v Avestra Asset Mgmt. Ltd. (in liquidation)* [2017] FCA 497 para. 216 (“Accordingly, the necessary requirement for liability in such a case is that the director failed to exercise reasonable care and diligence in circumstances that caused or failed to prevent the company from contravening the Act and where it was reasonably foreseeable that such contravention might harm the interests of the company.”). The cases so far have considered whether the director is liable where the director allowed the company to contravene a section in the Corporations Act, but arguably stepping stones liability under the duty of care may extend to breaches of other statutes, e.g., environmental laws. For a discussion of stepping stones liability, see AUSTIN & RAMSAY, *supra* note 93, para 8.305.15.

³⁶⁸ BARKER, *supra* note 66, at 14–24.

³⁶⁹ HUTLEY & HARTFORD DAVIS, 2016 MEMORANDUM, *supra* note 25 para. 51.

³⁷⁰ *McVeigh v Retail Emps. Superannuation Pty Ltd.* [2019] FCA 14.

³⁷¹ The content of corporate trustees’ duties is informed by both the *Corporations Act 2001* (Cth) s 1017C and the *Superannuation Industry (Supervision) Act 1993* (Cth) ss 52(2)(b) and (c), 52A. See also HUTLEY & MACK, *supra* 292 (explaining law as it relates to superannuation funds and recommending that trustee directors consider climate change risk in their decisionmaking processes).

controversy about climate change.”³⁷² The case settled on the eve of trial with REST acknowledging that “[c]limate change is a material, direct and current financial risk to the superannuation fund...Rest, as a superannuation trustee, considers that it is important to actively identify and manage these issues,” as well as committing to net zero by 2050 and reporting against the TCFD framework.³⁷³

More recently, a law student—Kathleen O’Donnell—has commenced proceedings against the Australian Government for failure to disclose climate-related risks to investors in Australian government bonds.³⁷⁴ She alleges that the Commonwealth engaged in misleading and deceptive conduct, and that government officials breached their duty of care and diligence by failing to disclose any information about Australia’s climate change risks in key information documents for investors.³⁷⁵ The claim alleges that Australia’s financial position and the investment performance of its bonds may be affected by climate change risks,³⁷⁶ and that these ought to be disclosed.³⁷⁷ The case does not break entirely new ground,³⁷⁸ but it is the first to focus on the Government’s obligations in relation to sovereign bonds.

Our findings from interviews with Australian participants suggested that growing discussion of directors’ duties and climate change—particularly through the Hutley/Hartford Davis opinions—has helped shift norms in this area such that the conclusion that duties apply to climate risks is now largely considered uncontroversial.³⁷⁹ As one interviewee described it, these developments are leading to “a slow broadening [of] understanding of what

³⁷² *McVeigh*, [2019] FCA at para. 9.

³⁷³ *Equity Generation Lawyers*, MARK MCVEIGH V RETAIL EMPLOYEES SUPERANNUATION PTY LTD, <https://equitygenerationlawyers.com/cases/mcveigh-v-rest/> (last visited Apr 13, 2021).

³⁷⁴ Jacqueline Peel & Rebekkah Markey-Towler, ‘A Wake-up Call’: *Why This Student is Suing the Government Over the Financial Risks of Climate Change*, CONVERSATION (July 27, 2020, 1:55 AM), <https://theconversation.com/a-wake-up-call-why-this-student-is-suing-the-government-over-the-financial-risks-of-climate-change-143359>.

³⁷⁵ *Id.* See *Australian Securities and Investments Commission Act 2001* (Cth) sub-div 12DA (“A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.”); *Public Governance, Performance and Accountability Act 2013* (Cth) s 25(1) (“(1) An official of a Commonwealth entity must exercise his or her powers, perform his or her functions and discharge his or her duties with the degree of care and diligence that a reasonable person would exercise if the person (a) were an official of a Commonwealth entity in the Commonwealth entity’s circumstances; and (b) occupied the position held by, and had the same responsibilities within the Commonwealth entity as, the official.”)

³⁷⁶ See, e.g., Paul Read & Richard Denniss, *With Costs Approaching \$100 Billion, the Fires Are Australia’s Costliest Natural Disaster*, CONVERSATION (Jan. 16, 2020, 9:09 PM), <https://theconversation.com/with-costs-approaching-100-billion-the-fires-are-australias-costliest-natural-disaster-129433> (reporting that the 2019–20 bushfires are estimated to have costed around AUD \$100 billion).

³⁷⁷ Peel & Markey-Towler, *supra* note 374.

³⁷⁸ See, e.g., previous misleading disclosure suits *supra* notes 104, 194, 370.

³⁷⁹ Interview with AUS3 (Jan. 13, 2018); Interview with AUS4 (Mar. 7, 2018); Interview with AUS5 (Mar. 2, 2018); Interview with AUS6 (Mar. 22, 2018); Interview with AUS7 (Feb. 23, 2018); Interview with AUS8 (Mar. 15, 2018).

those duties and expectations are, and how current law would be applied if it was . . . tested.”³⁸⁰

Despite growing understanding of the links between directors’ duties and climate risks, our interviews showed that actual practice within companies remains highly variable. Whereas directors of large listed companies—especially those in sectors where climate risks are perceived to be material in the immediate and near term—are increasingly likely to be well-informed and active on climate change, the same cannot be said of the broader directorship of Australian companies, particularly for those companies where climate risks are perceived as more remote.³⁸¹ Participants also expressed the opinion that skepticism of climate science remains a prevalent attitude on boards of ASX100 companies.³⁸²

When responding to questions on directors’ duties and climate change, many participants reflected on the longer-running debate over corporate purpose and the relevance of stakeholder interests versus those of shareholders discussed above.³⁸³ They noted the challenges for Australian company directors in moving beyond a focus on short-term shareholder-related interests and the tendency for directors to view climate change as a long-term concern, rather than a materially actionable risk to company interests in the near term.³⁸⁴

For those companies that are considering climate risk, the way that this consideration is integrated into broader governance processes varies considerably, echoing some of the diversity seen in the United States. Company-side interviewees provide various examples of governance processes for ensuring board oversight of climate risks, including risk management governance processes, such as regular materiality assessments and reporting to the board by risk and audit committees,³⁸⁵ or sustainability committees providing regular analysis of climate risks to the board and developing company policy and position statements on these issues for board endorsement.³⁸⁶ Some companies have also developed formal processes for the board to obtain external perspectives on climate risk. This

³⁸⁰ Interview with AUS6 (Mar. 22, 2018).

³⁸¹ Interview with AUS4 (Mar. 7, 2018); Interview with AUS6 (Mar. 22, 2018).

³⁸² Interview with AUS4 (Mar. 7, 2018); Interview with AUS5 (Mar. 2, 2018); Interview with AUS8 (Mar. 15, 2018); Interview with AUS16 (May 24, 2018); Interview with AUS17 (Apr. 19, 2018); Interview with AUS18 (Apr. 26, 2018).

³⁸³ See *supra* Section I.A.

³⁸⁴ Interview with AUS6 (Mar. 22, 2018); Interview with AUS15 (July 11, 2018); Interview with AUS16 (May 24, 2018); Interview with AUS17 (Apr. 19, 2018); Interview with AUS20 (June 4, 2018); Interview with AUS24 (May 17, 2018).

³⁸⁵ Interview with AUS9 (May 28, 2018); Interview with AUS10 (July 12, 2018); Interview with AUS12 (June 28, 2018).

³⁸⁶ Interview with AUS9 (May 28, 2018); Interview with AUS11 (Apr. 27, 2018); Interview with AUS14 (Apr. 30, 2018).

may include appointing expert climate change advisors or meeting regularly with civil society leaders for input on emerging risks and responses.³⁸⁷

Overall, the picture that emerged from the Australian interviews was one of growing understanding of the links between climate change and directors' duties, prompting some new processes and consideration of climate risks, particularly by large, risk-exposed companies, but not yet causing a wider corporate behavioral shift. As in the United States, though, the potential for litigation—and personal liability for directors found in breach of relevant duties—was seen as a potential gamechanger. The general perception was that if, and when, litigation, regulatory investigation, or shareholder reaction around potential breach of duty to manage climate risks does emerge, the pressure on directors to ensure they are fulfilling their legal obligations in this area will heighten considerably.³⁸⁸ Given the broader interpretations of relevant duties and the widespread acceptance and high profile of these interpretations, Australia is a likely jurisdiction for the emergence of climate change breach of duty suits and a potential testing ground for their feasibility elsewhere, including in the United States.

V. FUTURE POSSIBILITIES

In this Part, we suggest legal reforms that could make each of the three corporate and financial tools more effective in driving behavioral change. These suggestions draw upon experiences with use of those tools to date and interviewees' reflections upon them. In Section A, we provide a general framework for potential legal reforms. Then in Sections B through D we apply that framework to disclosure, shareholder engagement, and fiduciary duty, respectively.

A. *Framework for Reform*

The introduction outlined the varying positions that corporate governance and environmental law scholars take towards the role of non-shareholder interests in corporations. The middle-ground approach that guides most corporate climate activism accepts shareholder primacy, but argues that the long-term profitability of many corporations is increasingly impacted by climate change, so that tools focused on shareholder interests can be effectively used.³⁸⁹ Critics from one side argue that climate change does not yet matter enough within the time horizon of stock markets; corporations focused on profitability therefore are not promising targets for

³⁸⁷ Interview with AUS9 (May 28, 2018); Interview with AUS11 (Apr. 27, 2018); Interview with AUS15 (July 11, 2018).

³⁸⁸ Interview with AUS3 (Jan. 13, 2018); Interview with AUS8 (Mar. 15, 2018); Interview with AUS15 (July 11, 2018); Interview with AUS17 (Apr. 19, 2018).

³⁸⁹ *Supra* notes 37–45 and accompanying text.

climate change activists, so we should focus on other forms of regulation.³⁹⁰ Critics from another side argue that, as currently constructed, corporations are indeed unlikely to respond effectively to climate change, but corporate law should be reconstructed to require corporations to consider the public interest in addressing the issue.³⁹¹

The analysis of Parts II through IV, drawing on our interviews, provides support for each position. Those skeptical about the ability of corporations to address climate change can point to the lack of clear progress in changing corporate behavior despite the great attention being paid to disclosure and shareholder engagement.³⁹² We see a central truth here: activists should not fool themselves about the potential for these corporate governance tools to save the day. Other forms of regulation are much more important. For-profit corporations are not designed to solve a long-term, planet-wide, collective action problem like climate change.

Those advocating for deep reform of corporate law can flip the script on what to infer from the limited results of corporation-focused activism. Given the ongoing failure of governments to seriously respond to climate change, the urgency of addressing climate change, and the central role that corporations play in the economy, if corporations as currently constituted are not up to the task, we need to reconstitute them.

Those advocating the middle path of working within corporations under current law and institutions can argue that our results are not so definitive and dire. The disclosure and engagement initiatives described here are still new. Even now there are glimmerings of changed behavior, and many investors told us that as disclosure and proposals become more sophisticated and widespread and have time to take root, we can expect to see more change.³⁹³

We have much sympathy for the stakeholder approach. The limitations of existing corporations and corporate law are great, and the need for drastic, fast responses to the threat to our climate is greater. In our discussion below for each of the three legal tools, we will begin by sketching how corporate or securities law would respond if we adopted an aggressive, legally binding stakeholder theory of the corporation. If environmental law does not transform soon, it may be that anything short of such a fundamental shift in corporations will be inadequate to our situation.

And yet that fundamental shift in corporations and corporate law is unlikely to occur. So, we fall back on proposals that build upon existing corporate and securities law and initiatives as described in Parts II through IV. We suggest ways that these can be strengthened. These more pragmatic proposals will have less effect than adopting the stakeholder-focused proposals, but they are more feasible. Still, the stakeholder proposals are not

³⁹⁰ *Supra* notes 46–47 and accompanying text.

³⁹¹ *Supra* notes 49–52 and accompanying text.

³⁹² *Supra* notes 185–86, 202–04, 268–69, 292 and accompanying text.

³⁹³ *Supra* notes 187–88 and accompanying text.

merely a dream: they help shape our more pragmatic proposals, so that our suggestions push the shareholder-focused approach closer to the stakeholder view of the world.

Throughout this analysis, we consider how U.S. strategies might learn from the Australian experience. Because the jurisdictions have fundamental similarities, even with differences in the details of law and implementation, there are possibilities for the U.S. approach to borrow from the most effective Australian strategies.

B. *Disclosure*

Current initiatives have modestly increased disclosure in mandatory securities filings and greatly increased the use of voluntary sustainability reports.³⁹⁴ Much work has been done to devise reporting frameworks,³⁹⁵ but the lack of a common framework in the United States makes reports hard to compare, and the voluntary nature of most reporting leads to vagueness and cherry-picking of positive news.³⁹⁶ Australia, in this respect, provides an interesting model for the United States because of its more consistent use of one standard for disclosure.³⁹⁷

These weaknesses, as well as the siloing of voluntary disclosure from the securities disclosure process that involves more central decisionmakers and formal audit and oversight, keep disclosure from having the effect on operations that it could in the United States.³⁹⁸ The time has come for strengthened required disclosure.

An aggressive U.S. stakeholder-focused disclosure initiative would focus on a range of ESG issues, not just climate change. Investors, customers, and employees are currently focusing on a wide range of ESG issues, and many of the voluntary initiatives, like GRI and SASB, cover issues beyond climate change.³⁹⁹ A coalition of groups on a range of issues would be more likely to prevail politically. At least portions of the disclosure requirements would need to be rules rather than standards, both to ensure greater comparability across companies and to make it harder to greenwash. Disclosure could occur in separate sustainability reports rather than securities documents, but would be subject to similar anti-fraud rules, both increasing the accuracy of the disclosure and forcing companies to devote greater and higher-level attention to collecting the information.⁴⁰⁰ The materiality of what information needs to be disclosed would be judged by

³⁹⁴ *Supra* notes 105–21 and accompanying text.

³⁹⁵ *Supra* notes 110–17 and accompanying text.

³⁹⁶ *Supra* notes 149–52 and accompanying text.

³⁹⁷ *Supra* Section II.C.

³⁹⁸ *Supra* notes 178–79 and accompanying text.

³⁹⁹ *Supra* notes 112–14 and accompanying text.

⁴⁰⁰ *Supra* notes 173–75 and accompanying text.

more than the effect on financial performance.⁴⁰¹ Such an approach would echo reforms being pursued in the EU through the elaboration of guidelines under its Non-Financial Reporting Directive.

An important element of climate disclosure would discuss the impact of how a concerted effort to respond to climate change would affect the disclosing company. The two-degree scenario analysis of TCFD and many shareholder proposals in Australia and the United States points the way, as does the recent French law requiring companies to disclose how their company would contribute to meeting GHG emissions and clean energy targets set in the law.⁴⁰² However, early TCFD analyses by Australian companies still tend to self-select favorable scenarios on which to report.⁴⁰³

Such a requirement would need to be created by legislation, a major obstacle in deadlocked U.S. politics. It would also require the creation of a new administrative agency to implement and enforce the required disclosure.⁴⁰⁴ Corporate opposition would likely be strong, and the prospects of passing such legislation do not appear great. There are also considerable potential costs. Precise disclosure rules are difficult to create for many ESG topics, and what topics really matter may vary significantly over time, with the legal disclosure framework not reacting quickly. Thus, even if a stakeholder-focused system of ESG disclosures were politically feasible, its desirability would be debatable.

A more modest approach working within existing securities law would be more feasible and less risky. If new disclosure rules can be crafted within the authority of existing statutes, then all that would be required is action by the SEC. Several options are possible within existing securities law.

Most modestly, the SEC could provide greater guidance as to how climate change fits within current disclosure requirements. The SEC provided some guidance in 2010,⁴⁰⁵ but that could be updated and expanded. For instance, it could suggest that companies describe risks related to what Michael Vanderbergh calls “private environmental governance”—e.g., when Walmart commits to reducing carbon emissions in the products it sells, its suppliers with high emissions face a potentially serious reduction in demand for their products.⁴⁰⁶ Tied to such guidance, the SEC could engage

⁴⁰¹ Directive 2014/95/EU, art. 3, 2014 O.J. (L 330) 1. In June 2019, the European Commission published guidelines specifically on reporting climate-related information. *See also Commission Guidelines on Non-Financial Reporting*, EUR. COMM’N, https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en (last updated June 18, 2019) (detailing guidelines for reporting climate-related disclosures and requiring longer-term consideration of the materiality of climate-related information than financial information).

⁴⁰² *Supra* note 133 and accompanying text.

⁴⁰³ *Supra* notes 198–204 and accompanying text.

⁴⁰⁴ *See* Lipton, *supra* note 21, at 508 (advocating for mandatory disclosures and recognizing the functions of the SEC).

⁴⁰⁵ *Supra* notes 105–06 and accompanying text.

⁴⁰⁶ Michael Vanderbergh, *Disclosure of Private Environmental Governance Risks*, <https://papers.ssrn.com/abstract=3764130>.

in stricter oversight of how well companies follow the guidance. Australian regulators appear to be moving in this direction, having tentatively embraced the TCFD as a model for companies to disclose climate risks and recently advising regulated entities that they will scale up monitoring of climate disclosures.⁴⁰⁷ There is also the potential for greater regulatory guidance from Australian accounting standards bodies regarding how to integrate and quantify climate risks within financial statements.⁴⁰⁸ These steps provide important models for the United States to consider in its reform efforts.

More aggressive is the sustainability discussion and analysis requirement proposed by Jill Fisch.⁴⁰⁹ This would require a narrative analysis of the three most significant sustainability risks that a company faces.⁴¹⁰ Climate change would not be a top-three risk for all companies, but it would be for the companies that most significantly contribute to, and are affected by, climate change. The sustainability discussion is a standard rather than a rule and so would not help comparability as much as more detailed rules, but Fisch argues many common practices would emerge and help with comparability.⁴¹¹

The most aggressive option would impose a new, more detailed set of rules for climate change and other ESG topics.⁴¹² Since it would be part of securities law, only information that is material to financial performance would be required, reducing costs of compliance. We suggest a “comply or explain” approach: companies that feel portions of the new required disclosure are not relevant to them could choose not to comply and explain why.⁴¹³ This creates more flexibility and diminishes the risk of ill-considered rules creating high costs, though it would increase the risk of under-disclosure. The SEC could devise new rules from scratch, but the better option would be to adapt, at least as a starting point, one of the current voluntary disclosure frameworks.⁴¹⁴ The rulemaking process would be a good way to sort out which framework investors prefer.

⁴⁰⁷ See AUSTL. PRUDENTIAL REGUL. AUTH., CLIMATE CHANGE: AWARENESS TO ACTION 7 (2019). The APRA is also undertaking climate change financial risk vulnerability assessments. Summerhayes, *supra* note 192. ASIC has also stepped up its regulatory oversight. Media Release, Australian. Sec. & Invs. Comm’n, Financial Reporting Focuses for 31 December 2019, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-341mr-financial-reporting-focuses-for-31-december-2019/> (last updated Dec. 12, 2019).

⁴⁰⁸ See, e.g., AUSTL. ACCT. STANDARDS BD. & AUDITING & ASSURANCE STANDARDS BD., *supra* note 187, at 2.

⁴⁰⁹ See Fisch, *supra* note 21, at 956 (proposing an SEC-mandated sustainability disclosure and analysis in annual financial reporting).

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 961–62.

⁴¹² The SEC under the Biden administration has announced that it is reviewing climate-related and other ESG disclosure. *Supra* notes 140–41.

⁴¹³ Björn Fasterling & Jean-Christophe Duhamel, *Le Comply or Explain: La Transparence Conformiste en Droit des Sociétés [The Comply or Explain Approach: Company Law’s Conformist Transparency]*, 2 REVUE INTERNATIONALE DE DROIT ÉCONOMIQUE [R.I.D.E.] 129, 129 (2009) (Fr.).

⁴¹⁴ *Supra* notes 110–14 and accompanying text.

It is currently hard to say which of several alternatives is likely to win out.⁴¹⁵ We suspect that SASB is the best option.⁴¹⁶ It is adapted for securities-based disclosure, covers a wide range of ESG topics, and provides detailed, industry-specific rules. A downside of SASB, though, would be that it currently has less support outside the United States than some alternatives. As noted, Australia focuses on the TCFD.⁴¹⁷

Such a broad rules-based disclosure system would give investors the comparability they crave and reduce the tendency for vague, optimistic greenwashing. The “comply or explain” feature could lessen company opposition. Some companies might even support such disclosure, since the current proliferation of standards and information requests creates a dilemma for well-intentioned companies. New rules would provide one common framework and a level playing field. Though shareholder-focused, the disclosure would be useful for others as well.

C. *Shareholder Proposals and Engagement*

Both formal and informal shareholder engagement have increased greatly, with climate change a major element of that growth.⁴¹⁸ It is not clear that this engagement has yet had a major impact on operations. But there are signs of positive effects, and as engagement takes root and becomes more sophisticated, its impact could grow.⁴¹⁹

An aggressive stakeholder approach to governance and voting might further enable shareholder voice, given the current use of such voice to promote ESG issues. Or it might not, given the potential use of expanded shareholder voice by hedge fund activists seeking short-term profits.⁴²⁰ What a stakeholder approach would distinctively do is give more voice to stakeholders, including persons or groups with environmental expertise. A direct voice in making decisions could have much more impact than disclosure or fiduciary duties.⁴²¹

The most extensive approach to greater voice would be positions on the board of directors. Senator Elizabeth Warren, for example, has proposed that 40% of the directors on the boards of the largest corporations be elected by their employees,⁴²² which, due to her presidential campaign in 2020, has brought greater public attention to this issue. The case for board representation of environmentalists is weaker than for employees.

⁴¹⁵ *Supra* notes 167–68 and accompanying text.

⁴¹⁶ Larry Fink’s most recent letter to CEOs committing to pushing BlackRock’s portfolio companies to use SASB may increase the salience of that standard. Fink, *supra* note 37.

⁴¹⁷ *Supra* note 196 and accompanying text.

⁴¹⁸ *Supra* notes 207–08 and accompanying text.

⁴¹⁹ *Supra* notes 268–69 and accompanying text.

⁴²⁰ *Supra* note 223 and accompanying text.

⁴²¹ McDonnell, *From Duty and Disclosure*, *supra* note 65, at 81–82.

⁴²² *See id.* at 81, 100 (“[D]irectors are elected only by shareholders, and only shareholders have standing to sue for duty violations.”).

Environmentalists have a less intense stake in the operations of a corporation, and there is serious question as to who would have power to vote for such a representative.⁴²³ But one could certainly imagine taking the environmental expertise proposals that are beginning to appear and turning them into a legal requirement.

A lesser degree of voice would take the form of advisory councils. These would have no binding vote over decisions but would be regularly consulted by the board or officers on issues within their expertise. One could imagine either a general sustainability council with representatives of various interests, or different councils for different interests, with one focused on the environment.⁴²⁴

Mandatory stakeholder voice mechanisms might have the strongest effects of any of the possible reforms considered here, but they would also create the greatest change in corporate structure, provoke the greatest opposition, and impose the highest costs. They would require legislation, making them hard to achieve.

Working instead within the current corporate legal structure turns our attention to shareholder, not stakeholder, voice. Institutional investors have evolved to a point where shareholder voice may plausibly reflect (imperfectly) many stakeholder concerns, including climate change. Funds with a sustainability focus, along with individual investors concerned about such issues, are raising climate change repeatedly in both proposals and informal engagement. The big universal asset managers like BlackRock and Vanguard, with long-term stakes and broad portfolios, plausibly represent the public interest (imperfectly) in voting on those proposals, which determines whether they will pass. There are plenty of problems in the incentives and information facing the managers of such institutions, but they are enough aligned with public concerns to push for positive changes.⁴²⁵

Several legal issues should be addressed to give more room for shareholder ESG activism. The ERISA fiduciary duty interpretations that limit the ability of fund managers to base investment and voting decisions on climate change concerns should be changed,⁴²⁶ and the new rules further restricting consideration of ESG in investment and voting should be repealed, as the Biden administration has moved towards doing by announcing it will not enforce the new rules.⁴²⁷ Ideally, ERISA could be interpreted or amended to allow consideration of the non-financial interests

⁴²³ Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419 (2020).

⁴²⁴ McDonnell, *supra* note 65, at 109–10.

⁴²⁵ *Supra* notes 221–22 and accompanying text.

⁴²⁶ *Supra* notes 228–29 and accompanying text.

⁴²⁷ See Lipton, *DOL Proposes New Rules*, *supra* note 227 (“As ESG investing continues to accelerate, the Department of Labor (“DOL”) has proposed for public comment rules that would further burden the ability of fiduciaries of private-sector retirement plans to select investments based on ESG factors and would bar 401(k) plans from using a fund with any ESG mandate as the default investment alternative for non-electing participants.”); *supra* note 230 and accompanying text.

of beneficiaries.⁴²⁸ More feasibly, the seesawing guidance on incorporating ESG concerns into considerations of financial risk should return to the Obama-era grant of greater discretion.

On Rule 14a-8 proponent eligibility, we suggest reversing the recent “reform.” The recent SEC rule change increased the number of shares and holding period required in order to introduce a shareholder proposal.⁴²⁹ The old eligibility requirements did not need fixing. Shareholder proposals impose limited costs and serve a useful function. As several of our interviewees (even on the corporate side) noted, they provide a useful function of alerting managers to emerging concerns. Indeed, in this case, the U.S. approach to non-binding advisory proposals provides a useful legal model for Australian reforms.⁴³⁰

The recent SEC practice of allowing exclusion of GHG emission reduction target proposals⁴³¹ should stop, given the usefulness of such proposals.⁴³² There is an easy fix. The analysis allowing exclusion has reasoned that the significant policy exception, which forbids exclusion for proposals raising significant policy issues, does not apply to the anti-micromanagement rationale for the exclusion.⁴³³ That should be reversed,⁴³⁴ so that any proposal that addresses a significant policy issue that is genuinely relevant to the company’s operations should not be excludable under the ordinary business exclusion.

Finally, the literature surveyed in Section II.B.1, our interviews, and our idealistic stakeholder vision suggest a few shareholder proposals that seem particularly worth pursuing:

- Reporting on targets to address climate change in accordance with a two-degree scenario. These are specific and action-oriented, with the potential to induce greater operating changes than older reporting proposals.⁴³⁵

⁴²⁸ See WEBBER, *supra* note 214, at 184–88 (considering worker jobs in making investments, rather than a “returns-only” view of fiduciary duty).

⁴²⁹ See *supra* notes 232–34 and accompanying text.

⁴³⁰ Reforming the legal framework for shareholder resolutions is a live debate in Australia, with reform proposals drawing on both U.S. and U.K. models for advisory resolutions. See KYM SHEEHAN, AUSTL. COUNCIL SUPERANNUATION INVS., SHAREHOLDER RESOLUTIONS IN AUSTRALIA: IS THERE A BETTER WAY? 3 (2017) (discussing the low thresholds in the US to move non-binding resolutions which do not compel the company to act and the options for both binding and nonbinding resolutions in the UK); cf. GOVERNANCE INST. AUSTL., SHAREHOLDER RESOLUTIONS: IS THERE A CASE FOR CHANGE? 2 (2019) (explaining options proposed to address ACSI concerns regarding shareholder resolutions, including a general right to move non-binding resolutions, a non-binding vote on the annual report, a non-binding vote on a sustainability or ESG report, or a right to move binding, directive proposals).

⁴³¹ *Supra* notes 235–36 and accompanying text.

⁴³² *Supra* note 182 and accompanying text.

⁴³³ *Supra* notes 182, 232–36 and accompanying text.

⁴³⁴ As hinted at in a recent speech by the acting chair of the SEC. *Supra* note 242.

⁴³⁵ *Supra* note 182 and accompanying text.

- Disclosure of lobbying and political spending. Addressing climate change ultimately requires major environmental legislation, and such proposals may reduce some of the political opposition to such legislation.⁴³⁶
- Tying executive and director compensation to success in meeting climate change targets. Executive compensation is a critical tool for creating incentives to induce desired behavior.⁴³⁷
- Requiring a director or directors with significant environmental expertise. Many interviewees identified this as an emerging issue receiving growing attention, and it is a move in the direction of a stakeholder approach to governance.⁴³⁸
- Creating an environmental, or, more broadly, a sustainability advisory council. Many companies already reach out to a variety of stakeholders in various ways. An advisory council would formalize stakeholder engagement, giving it a focus, which could lead to more sustained attention from executive officers and the board. We have not seen such a proposal, but it (as well as the previous two proposals) would be a way of moving towards our more aggressive stakeholder engagement vision company by company, rather than by comprehensive legislation.

D. *Fiduciary Duty*

Emerging best practice in risk management incorporates climate change into the monitoring of company risk, but many companies do not yet follow that best practice.⁴³⁹ *Caremark*-style suits, claiming a failure to adequately monitor climate change risk, provide a potential path to push more companies towards better risk management, but such suits face large obstacles.⁴⁴⁰

A stakeholder-focused duty to monitor would require that boards address severe risks to significant stakeholders and interests impacted by a company's operations. Given the policy reasons underlying the business judgment rule, such a duty would, like *Caremark*, give boards very wide discretion in deciding how to design and carry out such a supervisory system. But the duty to monitor would go well beyond supervising whether the company is complying with the law. One of us has suggested such a duty in the context of financial companies following the financial crisis.⁴⁴¹ A broad stakeholder-focused duty would make sense in the context of

⁴³⁶ *Supra* note 266 and accompanying text.

⁴³⁷ *Supra* note 355 and accompanying text.

⁴³⁸ *Supra* notes 349–50 and accompanying text.

⁴³⁹ *Supra* notes 328–30 and accompanying text.

⁴⁴⁰ *Supra* notes 305–18 and accompanying text.

⁴⁴¹ Hill & McDonnell, *supra* note 315.

corporations whose core governance mechanisms reflect the voices of multiple stakeholders.

Such a duty seems extremely unlikely to be recognized by the Delaware courts. It greatly stretches *Caremark* and also reverses the core commitment to shareholder primacy. That commitment has, if anything, grown stronger and more explicit in Delaware recently. It is hard to imagine the courts switching direction anytime soon.⁴⁴²

A more modest approach might be to wait and see if supportive cases develop in other countries first—the law elsewhere may be more open to climate change supervision suits than Delaware is.⁴⁴³ Once a plaintiff decides to test the waters in Delaware, the greatest chance for success would exist where a company has violated existing law limiting GHG emissions, or some other climate-related laws. Such a case could then make a traditional *Caremark* claim suggesting a failure to monitor legal compliance. Even in the wake of recent cases allowing such suits to continue, such a claim would face long odds, but it might have a chance.⁴⁴⁴ However, focusing only on cases generated by violations of existing environmental or tort law would be very limiting—much of the point of the legal tools considered here is to prod corporations to change even though environmental law does not require it.

Thus, those proposing duty cases based on failure to address climate risk mostly conceive of climate risk as creating *financial* risk for a company. This goes beyond legal compliance risk but is less of a challenge to Delaware law than the stakeholder conception of risk. Still, such a theory would run up against the many cases strongly questioning whether the *Caremark* duty extends to the monitoring of business risk. But those cases do not *quite* hold that the duty to monitor does not extend to business risk, so the point remains open to argument, even if the chances of success are slim.

To succeed, litigants would need to find a very attractive defendant. Climate change would need to pose a great and pressing financial risk to the company, and yet the company would either have to have no system for monitoring climate risk at all or be completely ignoring obvious and multiple red flags about such risk. An appropriate situation may be hard to find, especially given the current lack of regulatory risks posed by environmental and energy law reforms compared to the European context. Most companies in the industries most affected by climate risk are now claiming to do at least *something* about addressing such risk. It may not be much, but *Caremark* does not require much at all. Maybe, though, there is an energy company out there that publicly engages in climate change denialism; that could make a promising target.

Over time, Australia may provide some helpful models for an approach because, as described above, it has a more promising environment for breach

⁴⁴² *Supra* note 300 and accompanying text.

⁴⁴³ *Supra* notes 322–23 and accompanying text.

⁴⁴⁴ *Supra* notes 300–18 and accompanying text.

of duty suits against directors. If that happens, its greater similarity to the United States than the European jurisdictions where the litigation has emerged to date may suggest pathways for U.S. lawyers working to craft an approach.

CONCLUSION

As explored in Part I,⁴⁴⁵ in both corporate and environmental law, there are those who argue for major reform of environmental law and express skepticism that tools focused on corporate governance can do much good. Our interview results in Parts II through IV suggest their skepticism has much justification. They are correct that environmental and energy law reform would address climate change more effectively. But we are skeptical about the pace of such reform, and our interviews do suggest that something can and needs to be done right now, with existing law and forward-looking corporations and investors, that does not preclude these longer-term efforts. Even if current approaches in disclosure, stakeholder, and fiduciary duty law are not yet advancing these goals substantially, we argue that—especially given the existing political climate—they form an important part of the regulatory toolkit that should be incorporated into strategic approaches.

This Article therefore includes both major and more limited reform proposals. We suggest deep changes taking a stakeholder approach, which could create companies much more willing to address climate change than current U.S. public corporations. But since significant reform is unlikely to pass in the near term, we also propose more modest reforms working within the long-term shareholder value approach underlying most of the activism we discuss in this Article.⁴⁴⁶ The reforms that we regard as more realistic do not promise drastic, immediate change, and such change may well be required to avoid very serious consequences from climate change.⁴⁴⁷

As the United States ramps up its ambition to address climate change under the Biden Administration through rejoining the Paris Agreement, extensive Executive Orders, and advancing legislation to support major investments in clean energy infrastructure, corporate and financial mechanisms are an important complementary tool.⁴⁴⁸ And helped along by relatively modest and achievable legal reforms, those efforts have a chance to have some real effects, if not dramatic ones. Given the long-lasting impact of GHG emissions, real and soon-achievable effects are worth pursuing as one part of a multi-prong effort of addressing climate change. Corporate and

⁴⁴⁵ *Supra* Sections I.A and I.B.

⁴⁴⁶ *Supra* Section V.A.

⁴⁴⁷ *Supra* Section I.B.

⁴⁴⁸ Emma Newburger, *Here's How Biden's \$2 Trillion Infrastructure Plan Addresses Climate Change*, CNBC (Mar. 31, 2021), <https://www.cnbc.com/2021/03/31/biden-infrastructure-plan-spending-on-climate-change-clean-energy.html>; Lorraine Woellert, *Biden Prepares Sweeping Order on Climate-Related Risks*, POLITICO (Apr. 15, 2021), <https://www.politico.com/news/2021/04/15/biden-climate-risks-executive-order-481962>.

financial law will never be the sole solution to the problem of climate change, but it shapes the decisions of companies and investors that are crucial to the level of global GHG emissions and efforts to adapt to impacts.

